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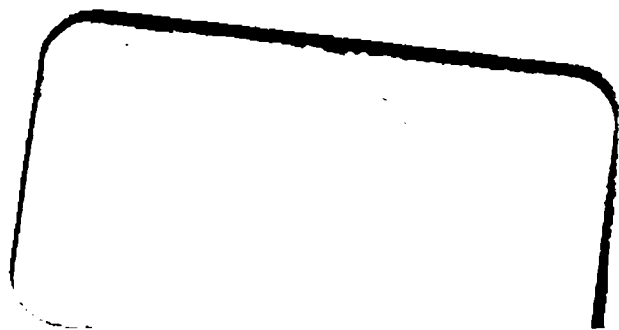
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HARVARD UNIVERSITY



June 2

39

REPORTS OF CASES
DECIDED IN THE
APPELLATE COURTS
OF THE
STATE OF ILLINOIS

VOLUME XLVIII

CONTAINING THE REMAINING CASES SUBMITTED AT THE NOVEMBER
TERMS, 1890 AND 1891, AND A PORTION OF THE CASES SUB-
MITTED AT THE MAY AND NOVEMBER TERMS,
1892, OF THE THIRD DISTRICT.

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

CHICAGO
CALLAGHAN & COMPANY
1894

Entered according to act of Congress, in the year 1894,
By CALLAGHAN & COMPANY,
In the office of the Librarian of Congress, at Washington, D. C.

Recd Apr. 30, 1894.

Stereotyped and Printed
by the
Chicago Legal News Company.

THE APPELLATE COURTS OF ILLINOIS.

THE Appellate Courts are held by three judges of the Circuit Court in each of the four districts. The Judges of the Appellate Courts are assigned by the Supreme Court for a term of three years. The following is the assignment of judges made at the June term, 1891. One Clerk of the Appellate Court is elected in each district for a term of six years.

REPORTER—Martin L. Newell, Springfield, Sangamon county.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago, Cook county.

TERMS—First Tuesdays in March and October.

CLERK—Thomas G. McElligott, Chicago, Cook county.

JUDGES.

JOSEPH E. GARY, Ashland Block, Chicago.

ARBA N. WATERMAN, Ashland Block, Chicago.

HENRY M. SHEPARD, Ashland Block, Chicago.

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, LaSalle county.

TERMS—Third Tuesday in May, and the first Tuesday in December.

CLERK—C. C. Duffy, Ottawa, LaSalle county.

JUDGES.

JAMES H. CARTWRIGHT, Oregon, Ogle county.

LYMAN LACY, Havana, Mason county.

OLIVER A. HARKER, Carbondale, Jackson county.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county.

TERMS—Third Tuesdays in May and November.

CLERK—George W. Jones, Springfield, Sangamon county.

JUDGES.

GEORGE W. WALL, DuQuoin, Perry county.

GEORGE W. PLEASANTS, Rock Island, Rock Island county.

CARROLL C. BOGGS, Fairfield, Wayne county.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.

Court sits at Mount Vernon, Jefferson county.

TERMS—Fourth Tuesdays in February and August.

CLERK—John W. Burton, Mount Vernon, Jefferson county.

JUDGES.

JESSE J. PHILLIPS, Hillsboro, Montgomery county.

NATHANIEL W. GREEN, Pekin, Tazewell county.

ALFRED SAMPLE, Paxton, Ford county.

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CASES

IN THE

APPELLATE COURTS OF ILLINOIS

THIRD DISTRICT—NOVEMBER TERM, 1890.

Allman et al. v. Lumsden et al., Commissioners of Kankakee Drainage District.

48	17
55	23
48	17
159	220
48	17
72	568
48	17
105	29

1. *Drainage Proceedings—Practice—Appeals.*—An appeal from an order of the County Court annexing lands to a drainage district under Sec. 58 of the act to revise and amend the Drainage Act of May 29, 1879, approved June 30, 1885, (Hurd's Statutes, 1891, p. 571,) is properly taken to the Circuit Court under the general provisions in R. S., Chap. 37, Sec. 122.

2. *Drainage Proceedings—Final Order.*—An order of the County Court annexing lands to a drainage district is a final order, from which an appeal lies.

Memorandum.—Proceedings under the Drainage Act. Appeal from an order of the Circuit Court of Champaign County, dismissing an appeal from the County Court; the Hon. EDWARD P. VAIL, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1890. Opinion filed October 24, 1892.

APPELLANTS' STATEMENT OF THE CASE.

The Kankakee Drainage District was organized under an act to provide for the construction, reparation and protection of drains, etc., approved May 29, 1879. This act was revised by act approved May 30, 1885, usually called the "Levy Act." The organization was effected in the County Court of Champaign County.

By section 58 of the revised act it is provided that, "any land lying outside the drainage district as organized, the owner or owners of which shall thereafter make connection with the main ditch or drain, or with any ditch or drain within the district as organized, or whose lands are or will be benefited by the work of such district, shall be deemed to have made voluntary application to be included in such drainage district, and thereupon the commissioners shall make complaint in writing, setting forth a description of such land or lands benefited and the amount of benefits. * * * and file said complaint in the County Court. * * * If the complaint was heard by the County Court in which such district was organized, and judgment given in favor of said district, a record of such judgment, giving a description of such lands annexed shall be made, and such lands described in the complaint in either case, shall be deemed a part of such district and shall be assessed as other lands therein." * * * Starr & Curtis Stat., 3d Vol., page 202.

The commissioners filed in the County Court their complaint under this section of the statute, alleging that the lands of the appellants were outside of the drainage district but that each owner had made connection with the district ditches and that each tract would be benefited by the work of such district fifty cents per acre, praying that the several owners be made defendants and that on a hearing the said lands may be annexed, etc.

A trial was had and a judgment rendered in favor of the district, by which it was "ordered and adjudged by the court that said lands and each tract thereof described in said original and amended complaint as above described (except a forty-acre tract) be and the same is hereby annexed to and made a part of the Kankakee Drainage District and shall be assessed as other lands herein," etc.

The defendants appealed to the Circuit Court.

The commissioners entered their motion in the Circuit Court to dismiss the appeal, which was allowed. The defendants prayed an appeal to this court, and assign error in the dismissal of the appeal.

Allman v. Lumsden.

APPELLANTS' BRIEF.

Does the appeal lie to the Circuit Court?

We claim it does, and that the statutes especially provide for appeals in just such cases. Starr & Curtis, Vol. 1, p. 728, Sec. 240, shows this:

"Appeals may be taken from the final orders, judgments and decrees of the County Courts to the Circuit Courts in all matters except as provided in the following section:" The following section, 241, provides for such appeals as should go to the Appellate and Supreme Courts and the case at bar is not one named in said last section. Hence the appeal should be taken to the Circuit Court as provided in Sec. 240 of this act.

S. R. REED, WM. G. CLOYD, and J. L. RAY & ASPERN,
attorneys for appellants.

APPELLEES' BRIEF.

In Evans v. Lewis et al., 121 Ill. 478, it was held that the legality of the extension of the boundaries of a district so as to take in additional lands can not be inquired into or questioned by a bill in chancery. The proper remedy is by writ of *quo warranto*. The case is where the legality of the corporation was questioned in a collateral manner. Yet the court there held that the only remedy was by *quo warranto*. So in Blake v. People, 109 Ill. 504. In none of these cases has the Supreme Court intimated that the remedy was by appeal or writ of error. In Lees v. Drainage Commissioners, 125 Ill. 49, it was held that *certiorari* would not lie, and that the only remedy was by *quo warranto*.

WILLIAM B. WEBBER, attorney for appellees.

OPINION OF THE COURT, *the Hon. George W. Pleasants,*
Judge.

This was a proceeding in the County Court under section 58 of the act to revise and amend the drainage law of May 29, 1879, approved June 30, 1885, and known as the Levy

Act, Hurd's Stat., 1891, p. 571, which section provides that the owners of any land lying outside the drainage district as organized, who shall thereafter make connection with any ditch or drain within it, or whose lands are or will be benefited by the work of such district, shall be deemed to have made voluntary application to have them included in it; and thereupon the commissioners shall make a complaint in writing for that purpose, setting forth a description of such lands and amount of benefits, the names of the owners and a description of the drain or ditch making connection with those of the district, and file it in the County Court or with a justice of the peace, who shall then fix a day for the hearing, of which the commissioners shall give such owners ten days' notice in writing, embracing a copy of the complaint, and at the time so fixed or at a time to which it may then be continued, the court or justice shall hear the cause; and if it is heard in the County Court and judgment is given in favor of the district, a record of such judgment, with a description of such lands annexed, shall be made, and they shall be deemed a part of such district and be assessed as other lands therein. The assessment of benefits against them may be made at any time the commissioners may deem proper, and the assessment roll thereof shall be filed and recorded and proceedings thereon had as in other cases; or they may be assessed when all lands throughout the district are assessed.

Kankakee Drainage District was organized by proceedings in the County Court of Champaign County under this act. The commissioners filed the complaint herein against appellants April 30, 1890, and upon trial had in the County Court, judgment was given in favor of the district, by which it was ordered that the lands described in said complaint (excepting a certain forty-acre tract mentioned) was annexed to and made part of said district, to be assessed as other lands therein; and that the clerk record the plat referred to as part of the record of the court.

From this judgment the respondents appealed to the Circuit Court, where on motion of the commissioners the appeal

was dismissed and judgment entered against respondents for costs. By further appeal they bring the record to this court, and by the assignment of errors present two questions: first, whether the judgment of the County Court was subject to appeal, and second, if so, to what court.

On behalf of appellees it is contended that the judgment of the County Court was merely interlocutory. This is argued upon the assumption that the judgment in question stands upon the same footing with the order provided for in section 16, which confirms the report of the commissioners upon the petition for the organization of the district and establishes the same with the boundaries designated. No provision is made for an appeal from that order specifically, but the same section proceeds to direct that upon its entry the court shall impanel a jury to assess the damages and benefits; and the following sections prescribe the proceedings upon such assessment, down to section 25, which provides for an order confirming it, and then that "appeals or writs of error shall be allowed therefrom as in cases of appeals from and writs of error to the county courts in proceedings for the sale of lands for taxes or special assessments." It is said that no land owner is hurt by the establishment of the district including his land, according to section 16, nor until its assessment is confirmed by the order entered pursuant to section 25, and therefore no right of appeal is given from the former, but is from the latter; and that since the judgment under section 58, here involved, only operates, like section 16, to include the respondents' land in the district, and does not *per se* burden it with any assessment or liability, no appeal should be held to lie from it.

We are inclined to agree that no appeal lies directly from the order under section 16. Not because we think it not subject to review by appeal, however, but because it is interlocutory only. The end contemplated by the proceeding and by the statute is the drainage of lands for agricultural, sanitary and mining purposes, and to that end the establishment of drainage districts by the order under section 16, is made a means.

That order designates the lands to be benefited by the proposed work and therefore to be assessed for it, and the agents under whose direction it is to be constructed. But the end is not reached until these agents are empowered and put in position to command the money required to pay for the damage to be done to other lands and the labor to be performed in and by its construction. This is accomplished by the provisions for the ascertainment of that damage and for the assessment of the lands benefited; the final order, in the nature of a judgment for the amount assessed, being the order under section 25 confirming the assessment. Hence, as we have seen, by the provision of section 16 itself, upon the entry of the order establishing the district, the proceeding goes on without break or delay to the "assessment of damages, or damages and benefits, as the case may be." This proceeding is commenced by the petition under section 2, and ended so far as the court is concerned, by the order of confirmation under section 25. The sections following, down to 58—the one here under consideration—direct as to the payment, collection and application of the amount ascertained by the confirmed assessment, and provide for some incidental proceedings in connection therewith, which are analogous in character to those relating to executions on money judgments in ordinary actions at law and to proceedings thereon; but the confirmation of the assessment is the final judgment. Hence, no appeal lies directly from the order establishing the district, but it is subject to review like other interlocutory orders, upon exception thereto duly taken and preserved, on appeal from the final judgment, which is expressly given.

We are of opinion, however, that the order here in question does not stand on the same footing with that made under section 16, for the reason that it is made under a different proceeding, and one of which it is not an incident, but the end; a proceeding which may be taken before a different tribunal from that in which the district is organized; which is commenced, not by a petition of land owners, but by a complaint of the drainage commissioners, and against

persons not parties to that in which the order under section 16 is made, and the appeal under section 25 allowed, and which involves no question that can arise in the other. It may be commenced long after the judgment under section 25 is rendered and the time for appeal therefrom is past. The order in favor of the district under section 58 grants all the relief sought by the complaint, and ends all proceedings thereon. It is true that the object of the annexation thereby made is to subject the lands so annexed to assessment as part of the district, but the object of this particular proceeding is annexation of the land, and when that is adjudged the proceeding is ended. Being thus final, both in the order and in the effect of this particular proceeding, that adjudication is subject to appeal.

The appeal must lie either to the Supreme, the Appellate or the Circuit Court. This was an appeal from an order of the County Court annexing lands of appellants to the drainage district. It would not lie to the Supreme Court under Sec. 25 of the Drainage Act, which provides for such appeal only from an order confirming an assessment. The other cases in which it lies to the Supreme or Appellate Court are indicated in Hurd's R. S., 1889, Ch. 37, Sec. 123, (p. 435), the Practice Acts, Sec. 88, (p. 1023), and the Appellate Court Act, Sec. 8, (p. 414), and it seems quite clear that this appeal does not come within any of these descriptions. We need to refer particularly only to two cases "involving a freehold," appealable to the Supreme Court, and "any suit or proceeding at law, or in chancery" other than those excepted in the Appellate Court, appealable to that court.

No freehold is here involved. The legality of the incorporation of the drainage district is not and can not be here questioned, because the proceeding for the annexation of these lands is collateral to that in which the district was incorporated. *Blake v. The People*, 109 Ill. 516, and cases there cited.

Nor is this a "suit or proceeding at law or in chancery" within the meaning of the act referred to. The right here

claimed by the commissioners has no likeness to anything known as a right at common law or in equity. It is created and given wholly by the statute. So, of the proceedings and remedy. We know of no precedent for any such pleading or judgment in the report of any case in any court of law or chancery that was not wholly authorized and provided by statute. It is therefore unlike the case of the Union Trust Co. v. Trumbell, 23 N. E. Rep. 355.

We hold that this appeal would not lie to the Supreme or Appellate Court and was properly taken to the Circuit Court under the general provision in Ch. 37, Sec. 122; Drainage District v. Kelsey, 120 Ill. 482.

For the error in dismissing it, the order of the Circuit Court is reversed and the cause remanded.

Rhodes v. The People of the State of Illinois.

1. *Rule to File Transcript—Dismissal for Failure, etc.*—The court upon its own motion ruled the plaintiff in error to present a complete transcript, properly certified, by a certain day. The only answer to the rule was the filing of several affidavits tending to show that the clerk had intrusted the work of making the transcript to the state's attorney. No effort was made to make it complete or correct. The writ was dismissed for non-compliance with the rule.

Memorandum.—Prosecution for illegally selling intoxicating liquor. Writ of error to the County Court of Piatt County to reverse a conviction had in that court; the Hon. H. E. HUESTON, County Judge, presiding. Heard in this court at the November term, A. D. 1890, and the writ dismissed for failure to comply with a rule to present a complete transcript, etc. Opinion filed December 2, 1892.

JAMES J. FINN and DAVID HUTCHISON, attorneys for plaintiff in error.

LODGE & HICKS, attorneys for defendant in error.

OPINION BY THE COURT.

This case was brought here at the November term, 1890.

As referred to throughout the record it was an information for selling liquor without a license. A motion to quash it was overruled. Another, for a bill of particulars of the sales intended and the names of all witnesses to be called for the people, was allowed, and the bill and names were furnished. The record recites that the cause coming on for trial upon "the issue joined," a jury was impaneled and sworn to try it; that after being sworn it appeared that one of the jurors was ill, and by agreement of the parties he was discharged and the trial proceeded before the eleven remaining, resulting in a verdict of guilty on one count and not guilty on all the others. A motion by the defendant for a new trial was denied and judgment entered on the verdict.

We discover nothing in the action of the court or jury to warrant a reversal of the judgment. But among the errors assigned were the following: "That the record does not show that any indictment against defendant was ever certified to the trial court from the Circuit Court of Piatt County, or that any information was ever filed against the defendant in said trial court or any court," and "that the record does not show an arraignment of defendant, nor any plea in said cause."

And it is true that the record here does not set out any indictment, information or plea, nor show any formal arraignment or waiver thereof. But from the indications above referred to and others, we unhesitatingly assumed that at least an information containing not less than eighteen counts was before the trial court and had been filed with the clerk, and therefore of our own motion on the 10th day of December, 1890, ruled the plaintiff in error to present a complete transcript properly certified by the 19th day of that month.

The only answer to such rule was the filing on that day of several affidavits tending to show that the clerk had intrusted the work of making up the transcript to the state's attorney and that the one here was so made. Plaintiff in error did not deny that it was defective, nor show any effort or disposition on his part to make it complete and correct.

We do not concede his right to require of us any judgment upon a record so apparently defective, brought here by him, and are not disposed to render any. We therefore dismiss his writ of error for his failure to comply with the rule or show any excuse therefor.

Koch & Co. v. Merk.

1. *Pleading—General Issue—Breach of Contract—Recoupment.*—When the defense to a suit is in the nature of a cross-action, the cause of which is damages sustained by a breach of an express agreement, the defendant, upon proper proof, may recoup general damages under a plea of the general issue as well as under a special plea.

2. *Pleading—Nil Debet.*—A plea of *nil debet* to a declaration in assumpsit on the common counts, being inappropriate, is a nullity, even in debts upon a simple contract. A set-off could not be proved under it without notice.

3. *Recoupment of Special Damages.*—Special damages can not be recovered or recouped unless they are specially set forth in appropriate pleas, or as a defense, come within the scope of the general issue.

4. *Damages—Special Damages—When Speculative, etc.*—Special damages, which are merely speculative, like probable profits, or not within the contemplation of the parties at the time of the contract, or not ascertainable with reasonable certainty by the usual rules of evidence, can not be recovered.

5. *Variance—Pleadings and Proofs.*—Evidence of an agreement to ship as soon as possible or within a reasonable time will not support an averment of an agreement to ship in two days.

Memorandum.—Action of assumpsit. Appeal by the plaintiffs from a judgment in their favor for \$39.50, rendered by the Circuit Court of Montgomery County; the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1890, and affirmed. Upon a rehearing at the May term, A. D. 1891, it was reversed. Opinion filed January 30, 1893.

The opinion states the case.

APPELLANTS' BRIEF.

The true measure of damages where there has been a failure to deliver goods, is the difference between the contract

Koch & Co. v. Merk.

price and the market value of the article at the time and place fixed by the contract for delivery. If such articles can not be had in the market where, by the contract, they were to have been delivered, they may be bought, in the nearest market, and the additional costs of getting them there will be the cost in the market where they were to be delivered. *Capen v. De Steiger Glass Co.*, 105 Ill. 185.

Under this rule, the damages in this case being special, no recovery for damages can be allowed unless the appellant contracted with appellee with special reference thereto. *C., B. & Q. R. R. Co. v. Hale*, 83 Ill. 360.

Appellee is not entitled to damages for his loss of time, the money paid his traveling salesman, and money expended for rent, etc. *C. J. L. Myers & Sons Co. v. Davis*, 17 Brad. 228; *Fessler v. Love*, 48 Penna. 407-410; *Benjamin on Sales*, pp. 1122, 1129 and 1135.

The measure of damages for failure to fulfill a contract can not be fixed by the loss occasioned to the other party from his own consequent failure to supply lumber therefrom, under a contract subsequently made with other parties, the first contract not having been made on the strength of the second. *Westmore v. Pattison*, 45 Mich. 439.

LANE & COOPER, attorneys for appellants.

APPELLEE'S BRIEF.

If the appellants failed to ship the goods in time and the appellee sustained damages, and there is no dispute that he did, he had a perfect right to retain in his own hands enough to liquidate such damages. *Drennan v. Bunn*, 124 Ill. 175; *Carpenter v. First Nat. Bk.*, 119 Ill. 352, 360; *West Union R. R. Co. v. Smith*, 75 Ill. 497; *Waterman on Set-off and Recoupment*, 466, § 416; p. 469, § 422; p. 592, § 530; Citing *Naylor v. Schenck*, 3 E. D. Smith, 133; *Id.*, p. 596, § 552; p. 662, § 617.

One witness, if sustained by corroborating facts and circumstances proved, may overcome two. That is this case and the court has properly refused the holdings. *C., B. &*

Q. R. R. v. Dickson, 63 Ill. 151; Totel v. Bonnefoy, 23 Ill. App. 55; Shevalier v. Seager, 121 Ill. 564.

McWILLIAMS & SON, attorneys for appellee.

BROWN, WHEELER & BROWN, of counsel.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

In April, 1884, appellants, manufacturers at Elberfeld, Germany, sold to appellee, a watchmaker, a bill of goods consisting of tools and materials for making watches, and amounting to \$1,214, of which he then paid \$750, and other parcels afterward, reducing the balance to \$39.50. These goods he immediately took to Memphis, Tennessee, and there commenced business.

On the 22d of April, 1885, he ordered another bill of like kind, amounting to \$1,582.73. On this purchase he has never made any payment, though he took with him a portion of the goods, priced at \$766.48, leaving the residue to be shipped to him at his expense and risk, and which were so shipped on the 17th of June. They arrived at New York by the 30th, but did not reach Memphis until about the 17th of August. Appellee then refusing to receive them, they were re-shipped to New York by direction of appellants, and there sold for their account for \$824.42, which was credited to appellee and exceeded the amount at which they were sold and charged to him by \$8.17.

This action was brought in August, 1888, to recover the balance due on the purchase of 1884, the amount of the bill bought in 1885 (less the proceeds of the re-sale in New York) and \$240.85 paid by appellants for consular fees at Elberfeld, custom house dues at New York, insurance at sea, freight and carriage, amounting in all to \$1,038.68. The declaration was in assumpsit, on the common counts, with another to cover the cost of the reshipment to New York. An itemized statement of the account sued on, showing this balance, was filed with it. The pleas were *nil debet*, and a

special plea averring that plaintiff agreed to ship the goods specified in the last invoice in one or two days from the date of the order, but failed to do so, whereby he sustained special damages exceeding the amount of their claim. These damages, as therein set forth were (1) "for delay and loss of time, \$1,000;" (2) "in expenses in placing said goods by selling on orders and being unable to deliver the same, \$1,000;" (3) "in general disappointment in business \$500;" (4) "in store rent \$105."

The court below, trying the cause without a jury, found for the plaintiffs and assessed their damages at \$39.50—the exact amount of the balance remaining unpaid on the purchase of 1884, overruled their motion for a new trial and rendered judgment upon the finding; to which exception was duly taken. On appeal to this court that judgment was affirmed; but a rehearing was granted, further argument has been submitted, and the case again considered.

It was proved and formally agreed on the trial that plaintiff's statement of the account, filed with the declaration, was true in fact. The issues were then confined to the averments of the special plea, as to which the burden of proof was upon the defendant. Under that plea he sought to recoup damages alleged to have arisen out of the purchase of 1885. However much these may have exceeded the amount of plaintiff's demand on account of that purchase, they could be applied no further than to extinguish it. No excess could be recovered, nor could it be set off against their claim on account of any other transaction. *Stow v. Garwood*, 14 Ill. 424, and later cases too familiar to require special reference. The plea, then, though purporting to answer the whole declaration, presented no legal defense to the claim for the balance remaining unpaid on the purchase of 1884, and plaintiffs were entitled at least to the judgment they obtained for the amount of that balance. But the court below found that as against the damages caused by their delay in the shipment of the goods, specified in the last invoice, they were entitled to no more; and this court affirmed its judgment on two grounds stated. First, that

the questions involved were questions of fact determined upon a conflict of evidence, and second, that the proof furnished no basis on which plaintiffs' damages, by reason of defendant's refusal to receive and pay for those goods, could be ascertained. This last proposition was based upon the holding that plaintiffs were bound, if they resold the goods elsewhere than at Memphis, to show affirmatively that it was a better market; that they did not so show, and therefore it did not appear that if they had been resold in Memphis they would not have brought more than they did in New York.

Upon reconsideration we are constrained to think that too much deference was paid to the finding, as such, and that it was not sufficiently supported by a proper kind or amount of evidence.

The questions of fact were, what was the agreement, if any, as to the time when or within which the goods were to be shipped; were plaintiffs negligent in respect to the shipment, and if so what damage was thereby caused to defendant?

The plea averred an express agreement to ship them in one or two days from the date of the order, and not later. No evidence was offered to prove it except the testimony of defendant. His positive statement was: "They were to be shipped in two days; that was the agreement." We find no circumstance shown which at all tends to corroborate it. It is discredited and contradicted by his own statement, in a letter to plaintiffs of June 11th, that "Promised was tendered me that the goods at least in fourteen days would be shipped." This letter, as it appears in the record, shows that he is a poor writer, or had a poor translator, or that it was inaccurately copied. For want of punctuation and capital letters, the beginnings and endings of clauses and sentences are in many instances left uncertain, and inapt words to be understood by the context. Counsel suggest that he intended to say he was promised that in fourteen days the goods would *arrive*. We think the suggestion unreasonable on its face. Neither of the parties could have supposed that goods could be freighted from Elberfeld to Memphis, pass-

ing the custom house in New York, in twelve days. It is also clearly forbidden by the context. He commences the letter by saying, "Since three weeks I expected daily to hear from you if and when my goods was sent." Three weeks from June 11th would be May 21st, and a letter to be then received must have been mailed from twelve to fifteen days previously, or about fourteen days from April 22d, the date of the order and alleged promise. Again, immediately following the statement of the promise above quoted, he says: "Therefore I rented an office and took Mr. Charles Rauch on the first day of July," evidently meaning not *on* that day, then long future, but *from* it. Had he understood the goods were to be shipped by the 24th of April and arrive in fourteen days, or within a month thereafter, we should suppose he would have arranged for an office and traveling man, if he wanted them, for a much earlier day than July 1st. There is, then, no escape from the fact that his statement as a witness is clearly and materially inconsistent with his letter written before this litigation arose. Therefore, without being further discredited, it would not be satisfactory proof of his plea.

But it was also contradicted flatly by each of the plaintiffs, in the deliberate form of a deposition. They swear that there was no such agreement. Fritz Koch states that the larger and heavier part of the goods ordered were not then in stock, but had to be manufactured; that they did not know how soon they could be, and that defendant was so informed at the time; and that for that reason they could not and did not indicate any definite time within which they would be shipped, but only promised to ship them as soon as possible—that is, as we understand, not literally, but reasonably possible—in other words, within a reasonable time under the circumstances; which is no more than the law would imply in the absence of an express agreement. Appellants were doing a very large business as manufacturers of such goods—"a million business," as appellee himself expressed it. It is not to be supposed that other contracts or orders previously made or received would be postponed

or neglected, or the regular course of operation in the factory departed from, to fill this. Albrecht Koch testified to the same effect, as to the agreement and the reason for it. This testimony was not contradicted by any circumstance or other evidence except the statement of appellee. They appear to be quite as intelligent and unbiased and to have had as full means of knowledge as he. The court below did not see or hear them. So far as can be judged from the record, they were for every reason at least as credible and reliable as he; and if they were, being two to one, it is as true and certain as the mathematics that on this issue the preponderance of the evidence was with them.

The defense here was of the nature of a cross-action, the cause of which, as stated, was damages sustained by breach of an express agreement. We understand that in an action like this the defendant, upon proper proof, may recoup general damages under the general issue as well as under a special plea. *Cooke v. Preble*, 80 Ill. 381, and cases there cited.

But here there was no general issue. The plea of *nil debet*, being inappropriate, was a nullity. 1 Chitty on Pl., 521. Even in debt on simple contract, a set-off could not be proved under it, without notice. Stephen on Pl., 173, note *p.* (3d Am. Ed.) And the damages sought to be recouped were of the kind known as special, that is, not the necessary, though they may have been the natural consequence of the delay complained of; and such are not recoverable in any way unless especially alleged. *C. J. L. Myers & Sons Co. v. Davis*, 17 Brad. 228, and authorities there cited. Then the defense here intended could be made only under the special plea; for there only were they so alleged. Its foundation was the alleged agreement. If that was not proved substantially as laid, the defense necessarily failed, whatever may have been shown as to the breach of some other duty or agreement and resulting damages. Evidence of an agreement to ship as soon as possible or within a reasonable time will not support an averment of an agreement to ship in two days.

We think it unnecessary, with reference to another trial, and might be hurtful, to consider whether the evidence showed any unreasonable delay; but something should be said on the subject of damages, in relation to which the finding seems to us to be also unsupported by proper proof.

The testimony of Mr. Rauch, the appellee's traveling man, was simply worthless, because he only stated his opinion that appellee was damaged by the delay, and how, but not to what amount, nor any data from which it could be estimated even approximately. Appellee's statement was as follows: "If shipped according to contract the goods would have arrived at Memphis the 12th or 15th of May. There was three months delay. I lost forty per cent on the goods. I furnished a store, paid rent and for books and printing. I lost \$300 on that. I count my time at \$80 a month for five months, \$400. The most I lost besides that was when the traveling man was on the road. It cost \$350."

We do not see that this statement is at all improved by any other. It may therefore be taken as the presentation of appellee's entire case on this question. There was no other witness on his part.

From the testimony of both we understand that the alleged loss of forty per cent on the goods he brought with him is attributed to the fact that they did not constitute complete sets of tools or materials, but were supplemented by those to be shipped, and consequently, on sales made or orders received for complete sets, he was unable to deliver them. To what extent this was so was not stated. He made some sales and realized some profits thereon before June 11th; for in his letter of that date he says: "Till yet we have very little business; about \$48 profits." He testified that about the 20th of August he took what stock he then had to St. Louis, where he tried to sell it for cost, and disposed of it in about three months; but fails to state what it brought, or whether more or less than cost. It has been seen that he rented an office and employed a traveling man from the 1st of July. This man he recalled and discharged within a month, because he could not fill the orders sent in

by him. But it also appears that the place of delivery of the goods to be shipped was Elberfeld, and their transportation was at the risk of appellee; that they were delivered there on the 17th of June, and were in New York by the 30th. Appellee says they laid there a month, but he underestimates the time. Had he attended to them as he ought, they would have been in Memphis in time to fill promptly every order obtained by Rauch. In this evidence, then, there is no basis upon which to ascertain, or to estimate approximately, how much of this loss, if any, was due to the delay in shipping or any negligence of appellants, rather than to that of appellee.

It also appears that when he made this purchase of 1885, he had been in the same business with the same kind of stock and at the same place for nearly a year, as was known to appellants; from which it must be presumed that he already had such a place, with such furniture, books, advertisements and assistants as he thought were suitable and he could afford, for carrying on that business. Appellants therefore could have had no reason to suppose, when these goods were ordered, that any such expenses would be incurred by appellee, with special reference to them. And if they had, the evidence fails for the reason above stated, to show how much of it is chargeable, as loss, to their negligence, rather than to his.

While it is probable the goods were intended for sale, it was shown that appellee was a practical watchmaker and repairer. Whether the business as previously carried on included his work as a mechanic does not appear; nor whether it was intended to be so carried on after the purchase of 1885. But his estimate of the value of his time—\$80 a month—which would be reasonable enough if it refers to what he could earn as a mechanic, is purely speculative and conjectural, depending upon the question and amount of profits, if to his time as a merchant; and whether to one or both, the delay in shipping was not five months. According to the evidence, conceding his contention as to the agreement, it was less than two, according to his letter, still less,

and according to the statement of appellants, none at all. Whatever it may have been his letter shows it was not wholly lost to him as a merchant, and no reason is perceived why he should have lost a single day by enforced idleness as a mechanic, for the stock still on hand, with what he brought home of the last purchase, must have furnished abundant material for work in that character for two months.

How much did he lose "when the traveling man was on the road?" He says it "cost" \$350; for both salary and expenses, we presume. Were his labors wholly unproductive? Were any orders he obtained filled? How many did he obtain, and for what amount? If none were filled, whose negligence prevented? When did he go on the road? When was his first order sent in? Might not the goods with proper attention by appellee have been forwarded from New York and reached Memphis before it was received? Upon all of these obvious and pertinent questions the record is silent.

It has already been observed, upon authorities cited, that special damages can not be recovered or recouped unless they are specially set forth; and we may now add, nor then, if they are merely speculative, like probable profits (*Greene v. Williams*, 45 Ill. 209; *Benton v. Fay & Co.* 64 *Id.* 422) or were not within the contemplation of the parties when the agreement was made (*Goodkind v. Ragan*, 8 App. 413; *Benton v. Fay & Co. supra*), or not ascertainable with reasonable certainty by the usual rules of evidence. *Hair v. Barnes*, 26 App. 580, and cases there cited.

Upon the facts above stated we think neither of the four items of damage alleged in the plea can stand these tests of admissibility. Each clearly seems to be either purely speculative, or not presumably within the contemplation of the parties when the agreement to ship was made, or too uncertain both as to the amount, if any, and to the cause of it. The one most clearly susceptible of satisfactory proof is the last, being "to damages in store rent, \$105"—but we find no particle of evidence in the record to warrant the presumption that appellants, on the 22d of

April, 1885, had the slightest reason to suppose appellee intended to rent a store for these goods. Besides, his rent was to commence from July 1st, when they had passed the custom house in New York. It was due to his neglect and not to theirs that they remained in New York for a single day thereafter. For how much time lost is this \$105 charged? And what basis is furnished for ascertaining with reasonable certainty, or approximately, what the damage on this account would have been if he had properly seen to the forwarding of the goods?

For the reason that the finding appears to us to have been without sufficient support from the evidence and to have done substantial injustice, the judgment will be reversed and the cause remanded.

Toledo, St. L. & K. C. R. R. Co. v. Thompson.

1. *Railroads—Failure to Fence Track, etc.—Cattle Guards.*—An action was brought against a railroad company for killing domestic animals by a freight train at a small unincorporated village on the line of its road at which it had a station house and stopped its trains to receive and discharge freight and passengers, and where it was claimed the animals got upon the track. It was conceded that at the place in question the road had been in use for more than six years, and that it was not a place specifically excepted from the statutes, but it was contended that the company's duty to afford the public reasonable safety and despatch in the transaction of business, and provide a ready and convenient means of access to its station, authorized the company to omit the fence and cattle guards at the place in question. *It was held* that by law a railroad company was not bound to fence its depot grounds and the tracks and switches adjacent thereto in towns and villages, so far as their proper use and convenience requires that they should be left open for the transaction of its business with the public, but the question for determination from the evidence whether such use and convenience did require that places like the one in the case at bar should be left open was one of fact, and properly left to the jury.

Memorandum.—Action for killing domestic animals. Appeal from a judgment for plaintiff, rendered by the Circuit Court of Coles County;

48	36
53	635
48	36
113	175

T., St. L. & K. C. R. R. Co. v. Thompson.

the Hon. JAMES F. HUGHES, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1891, and affirmed. Opinion filed October 24, 1892.

APPELLEE'S STATEMENT OF THE CASE.

Appellee's horse was killed by a train at Fair Grange, an unincorporated village, on appellant's railroad. At that place the railroad, running north and south, crosses a public highway, running east and west. The railroad is fenced on the west, but not on the east, for a distance of 470 feet north of the highway. From that point there is a fence on the east side also, but no cattle guard or wing fences to keep stock out of the lane thus formed, for a distance of 236 feet north of the point where the fence on the east side of the track begins. Appellee's horse came on the track at a point north of the mouth of this lane and was struck by an engine and killed. A wing fence and cattle guard would have prevented the horses from getting on the track at that point and being killed.

APPELLANT'S BRIEF.

The burden is upon appellee to show by a preponderance of the evidence that his horse got upon the track at a point where the company was required to have a fence, and had failed to have such fence, or had only a defective one. It is not sufficient to show that the horse was killed at such point, but it must appear that it got upon the track at such a place. *Wabash Ry. Co. v. Charles Brown, Admr.*, 2 Ill. App. 516; *Ill. Cen. Ry. Co. v. Swearingen*, 33 Ill. 289; *Ill. Cen. Ry. Co. v. Swearingen*, 47 Ill. 206; *G. W. Ry. Co. v. Hawks*, 36 Ill. 282; *St. L., A. & T. H. Ry. Co. v. Elisha Linder*, 39 Ill. 433; *T. P. & W. Ry. Co. v. Darst*, 51 Ill. 365.

There is no evidence in this record as to where the horse got upon the track. The evidence is conclusive that Fair Grange is a station upon appellant's road, and the needs of the public require that the station and depot grounds be left open, and therefore could not and should not be fenced. *C., B. & Q. Ry. Co. v. Hans*, 111 Ill. 114.

Under a similar statute to ours, it has been held in Indiana that roads need not be fenced or cattle guards constructed where such construction would be dangerous to the employes. *Lake E. & W. R. R. Co. v. Knable*, 94 Ind. 454; *E. & T. H. R. R. Co. v. Willis*, 93 Ind. 507.

WILEY & NEAL, attorneys for appellant.

APPELLEE'S BRIEF.

It has been decided that a railroad company is not bound to fence up "such parts of its depot grounds as are required to be open for the convenience of the public in the use of the road." *C., B. & Q. R. R. Co. v. Hans*, 111 Ill. 114.

F. K. DUNN, attorney for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

Appellee's horse was struck and killed by a freight train at Fair Grange, a small unincorporated village on the line of appellant's railroad, at which it had a station house and stopped its trains to receive and discharge freight and passengers. He claimed that it got upon the track through the neglect of appellant to fence its road at that point, in violation of the statute, and brought this action before a justice of the peace, on the trial of which, upon appeal, he obtained a verdict and judgment thereon for \$65 damages.

It is conceded that at the place in question the railroad had been in use more than six months, and that the place was not specifically excepted by the statute; but it is contended, upon authority of *C., B. & Q. R. R. Co. v. Hans*, 111 Ill. 119, that its duty to "afford the public reasonable safety and despatch in the transaction of business" and "provide a ready and convenient means of access to its station" authorized the company to leave it open as it was. And whether it did, was the only question really in dispute in the case.

We fail to get from the testimony and plat introduced an

exact idea of the location of the tracks, buildings and fences, but understand the general situation to have been as follows:

The village, consisting of half a dozen dwellings and two or three stores, was all east of the railroad grounds. The track, running north and south, crossed at the station a public highway running east and west—the station being in the southwest corner made by the intersection, west of the track and south of the highway. A side track or switch was laid west of the main track, and was properly fenced on the west side of it. An elevator and a corn crib were on the east side of the main track, north of the highway. A private fence inclosed land of Mr. Babb, also lying north of the highway and east of the track, the west line of which fenced the track on the east side from a point ninety-one feet north of the north end or side of the elevator; but between the elevator and that point the railroad was open on that side. Nor was there any wing fence from that point to the track, nor any cattle guard there or at the highway crossing. Thus there was nothing to prevent cattle or horses from going upon the tracks from the east between the elevator and the south end of Babb's west fence, or from passing up the lane formed by that fence and the wire fence on the west side of the tracks, from that opening or from the public highway.

We see no reason, founded on the convenience of the public, for leaving this opening, or for failing to construct cattle guards at the highway crossing. It appears that the business at the elevator was done from the south side of it. There was sufficient access to the depot also from the highway. Indeed, no stress is laid in the argument upon the necessities or convenience of the public. The point urged is that a wing fence from Babb's corner and cattle guards in connection, or cattle guards at the crossing, would have endangered the lives of railroad employes handling cars on the side or switch track; and the assignment of error relied on is the refusal of the court to give an instruction asked, as follows: "That the statute only requires cattle guards at highway crossings, and if you believe from the evidence that the fence on the east side of

defendant's railroad was not the fence of the defendant and that a cattle guard at the south end of said fence would endanger the lives of employes, then the defendant was not required to construct a cattle guard at this point."

At the request of the defendant the court did give an instruction in accordance with the rule announced in C. B. & Q. R. R. Co. v. Hans, *supra*, that "defendant was not bound to fence its depot grounds and the tracks and switches adjacent thereto, in towns and villages, so far as their proper use and convenience require that they shall be left open for the transaction of its business with the public," and properly left it to the jury to determine from the evidence whether such use and convenience did require that they should be left open as they were in this case. This was sufficiently liberal. The jury seem to have found against the defendant upon the question of fact thus submitted, and as we understand the evidence, were warranted in so finding. The refused instruction drew from the supposed convenience of the company a conclusion of law which could properly follow only from that of the public. It was conceded that the south end of Babb's fence was not at a "road crossing," where, only, the statute required the company to construct a cattle guard. The instruction, after expressly calling the attention of the jury to this provision of the statute, proceeds with the implication that the killing of plaintiff's horse was attributable to the want of a cattle guard at that point, and confines the case to the question whether the company was "required" to construct one there. It tells the jury it was not so required by the statute, and not otherwise if its construction there would endanger the lives of employes. But it is manifest that to keep cattle or horses off the tracks it would be necessary to have a wing fence and cattle guard there, if there was no fence from Babb's to the crossing, and a cattle guard at the crossing. If the company created this necessity by its own neglect of duty, then it was bound to meet it, at its own risk of the danger to its employes; and whether it did so create it was the real question for the jury, which the instruction excluded. We think it was properly refused. Judgment affirmed.

Wenz v. Tirrill.

Wenz v. Tirrill.

1. *Rule 30—Briefs and Abstracts.*—If the defendant in error or appellee shall fail to file his brief in compliance with the rules, the judgment or decree will be reversed *pro forma*, unless the court, on examination of the record, shall deem it proper to decide the case on its merits. 5 Brad. 13.

2. *Practice—Failure to File Brief.*—A failure on the part of appellee to file a brief under the rules of court is cause for reversal.

Memorandum.—Appeal from the County Court of Coles County, the Hon. LAPSLEY C. HENLEY, County Judge, presiding. Heard in this court at the May term, A. D. 1891, and reversed for a non-compliance with rule 30. Opinion filed October 24, 1892.

A. C. FICKLIN, attorney for appellant.

OPINION BY THE COURT.

No brief being filed for appellee, and the abstract failing to show that the judgment was clearly right, it is reversed and the cause remanded under Rule 30 of this court.

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1. *Variance—Pleadings and Proof.*—An objection to a judgment on the ground of variance between the declaration and the proofs where made for the first time in the Appellate Court, if not interposed to the admission of the evidence nor among the reasons assigned in writing in support of a new trial, it must be considered as waived. Had the objections been specifically made at any time before judgment it could have been obviated in a few moments by an amendment of the declaration, but having submitted the case to the jury without so making it and taken the chances of a favorable verdict, a party can not be heard to urge it in the Appellate Court.

2. *Instructions—Duty of Carriers of Passengers.*—It is not error to instruct the jury, in an action against a railroad company for personal injuries, that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prose-

cution of the business, to prevent accidents to passengers riding upon their trains or alighting therefrom.

3. *Negligence—A Question of Fact—Exception.*—It may be regarded as settled in this State that as a rule, negligence, contributory or other, and whether the facts be admitted or proved, is a question of fact. The omission of a duty enjoined or commission of an act forbidden by a statute are recognized exceptions, and so is an act which at once strikes the minds of men in general as desperate or plainly reckless, like jumping from a train moving at the rate of fifty miles an hour.

Memorandum.—Action for personal injuries. Appeal from a judgment for the plaintiff, rendered by the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1891, and affirmed. Opinion filed October 24, 1892.

APPELLEE'S STATEMENT OF THE CASE.

The appellee resided in Elkhart, Logan County, Illinois. She had been on a visit with her son, who resided near Broadwell, and on the 28th day of October, 1890, she purchased a return ticket at Broadwell, in the same county, to go to her home in Elkhart, Elkhart being the next station south of Broadwell, about six miles, on the Chicago & Alton Railroad, intending to return by the next train. The train arrived at Broadwell about six o'clock and about daybreak in the morning, appellee took the train to go to Elkhart. The car was crowded and the conductor procured her a seat in the rear end of the chair car. The train was composed of baggage car, smoking car, chair car and one or two sleepers. When the train arrived at Elkhart the brakeman announced the station once in the car where appellee was sitting, which was heard by her. The train stopped at Elkhart for a few moments, witnesses disagreeing as to the exact length of time. As the train slowed up after the announcement of the station, appellee left her seat and started forward to the front or south end of the car, from which end the brakeman announced the name of the station, and walked down the car as quickly as she could, carrying her valise in her hand. Passengers were coming in at the door as she got there and she asked them to let her pass. She got by them as soon as she could, got out on the

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platform and stepped down the steps. She then noticed that the cars were moving very slowly. She stepped off on the platform and by the accelerated motion of the train, or its sudden starting, she was thrown upon the platform and injured.

APPELLANT'S BRIEF.

The proof in this case does not fit the declaration.

The evidence being that appellee knowingly and intentionally jumped off a fast moving train, was such negligence as to preclude a recovery. Secs. 4 and 5, Vol. 2, Redfield on Railways, p. 240; I. C. R. R. Co. v. Able, 59 Ill. 132; Illinois Central R. R. Co. v. Phillip Lutz, 84 Ill. 598; Illinois Central R. R. Co. v. Chambers, 71 Ill. 520; Burrows v. Erie Railway, 63 N. Y. 556; Ohio & Mississippi Ry. Co. v. Stratton, 78 Ill. 94; Damont v. New Orleans & Carrollton R. R. Co., 9 La. An. 441; Railroad Co. v. Aspell, 23 Penn. St. 147; Gavett v. Manchester & Lawrence R. R. Co., 16 Gray (Mass.), 501; Jeffersonville R. R. Co. v. Hendricks, Admr., 26 Ind. 228; Jeffersonville R. R. Co. v. Swift, 26 Ind. 459; Crawfordsville R. R. Co. v. Duncan, 28 Ind. 441; Kelly v. Hannibal & St. J. R. R. Co., 70 Mo. 604; Straus v. Kansas City, St. J. & C. B. R. R. Co., 75 Mo. 185; Houston & Texas R. R. Co. v. Leslie, 57 Tex. 83; Secar v. Railroad Co., 10 Fed. Rep. 15; Jewelt v. The Chicago, St. Paul & Minn. R. R. Co., 54 Wis. 612; 6 American & English R. R. Cases, 379; Lake Shore & Michigan Southern R. R. Co. v. Bangs, 47 Mich. 470.

While generally negligence is a question of fact, the fact that appellee intentionally jumped from a train that she knew to be moving, being undisputed, the question of contributory negligence then becomes one of law. Morrison v. Erie Ry. Co., 56 N. Y. 307; C. E. & I. R. R. Co. v. O'Conner, 119 Ill. 594; Fernandes v. Sacramento City R. R. Co., 52 Cal. 45; 9 Am. Ry. Reports, 352; Gavett v. Manchester & Lawrence R. R. Co., 16 Gray (Mass.) 501; Gramlieh v. R. R. Co., 9 Phil. 78; Geietz v. R. R. Co., 81 Pa. St. 274; R. R. Co. v. Feller, 84 Pa. St. 226; Delaware, Lackawanna &

Western R. R. Co. v. Toffey, 38 N. J. Law, 525; Bonnell v. Delaware, Lackawanna & Western R. R. Co., 39 N. J. Law, 189; Pennsylvania R. R. Co. v. Righter, 42 N. J. Law, 180.

The instructions numbered 4 and 6, given for plaintiff, do not state the law correctly as applied to an injury to a passenger in getting off a train. Railroads are not required to exercise the highest degree of care to secure the safety of passengers except so far as relates to the road bed, construction and equipment of the road, etc.; in those cases the passenger must rely solely on the carrier; but when, in getting off a train, a passenger is injured, the reason for the rule fails; it can therefore have no application to the facts of this case. C. & A. Ry. Co. v. Pillsbury, 123 Ill. 20; C. & A. Ry. Co. v. Fisher, 31 Appellate, 36; Meier v. Pennsylvania, 64 Penn. 225.

BLINN & HOBLIT, attorneys for appellant.

APPELLEE'S BRIEF.

There was no variance between the proof and declaration. No objection was made in the court below on that ground and it was not assigned as error in the motion for a new trial. It therefore can not be raised for the first time in this court. Lake Shore & Michigan Southern Ry. Co. v. Ward, 35 Ill. App. 423; St. Clair Co. Ben. Soc. v. Feitsam, 97 Ill. 474; Start v. Moran, 27 Ill. App. 119.

The instructions for the plaintiff as to the degree of care required of defendant as a carrier of passengers, stated the law correctly. Galena & Chicago Union Railroad Co. v. Yarwood, 15 Ill. 471; C., R. I. & P. Ry. Co. v. Barrett, 16 Ill. App. 23; Keokuk N. Line Packet Co. v. True, 88 Ill. 614; C., B. & Q. R. R. Co. v. George, 19 Ill. 510; Galena & Chicago Union R. R. Co. v. Fay, 16 Ill. 558; Ohio & R. R. Co. v. Deckerson, 59 Ind. 321; Phila. etc., R. R. Co. v. Derby, 14 How. (U. S.), 468-486; McElroy v. Nashua & L. R. R. Company, 4 Cush. (Mass.), 400; Carroll v. Staten Island R. R. Co., 58 N. Y. 138; Baltimore & O. R. R. Co. v. Wightman, 29 Gratt. (Va.), 431; Story on Bailments, Sec. 601; Hutchinson on Carriers, Secs. 500 and 501; Thompson

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on Trials, Vol. 2, Sec. 1774; *Taber v. L. D. & W. R. R. Co.*, 71 N. Y. 489.

The railroad company was bound to afford appellee a reasonable opportunity to leave its train, and if, by reason of not doing so, appellee was injured while in the exercise of care and caution, the company would be liable. *T., W. & W. R. R. Co. v. Baddeley*, 54 Ill. 19; *Illinois Cent. R. R. Co. v. Able*, 59 Ill. 131; *McNulta v. Ensich* (Supreme Court Illinois), 24 N. E. Rep. 631; *Penn. R. R. Co. v. Kilgore*, 32 Penn. St. 292.

Whether alighting from a moving train is such contributory negligence as will bar a recovery is, under all the circumstances of the case, a question of fact for the jury. *Chicago & Alton R. R. Co. v. Bonifield*, 104 Ill. 223; *Illinois Central R. R. Co. v. Haskins*, 115 Ill. 300; *Chicago & N. W. R. R. Co. v. Trays*, 33 Ill. App. 307; *Doss v. M., K. & T. R. R. Co.*, 59 Mo. 27; *Wyatt v. Citizens R. R. Co.*, 55 Mo. 485; *Kansas G., S. & L. R. R. Co. v. Dorough* (Supreme Court Texas), 10 South-Western Rep., p. 712; *Louisville, etc., R. R. Co. v. Crunk*, 119 Ind. 542; *Bucher v. New York Central Ry. Co.*, 98 N. Y. 128; *Penn. Ry. Co. v. Kilgore*, 32 Penn. St. 292; *Waller v. Hannibal Ry. Co.*, 83 Mo. 608; *Nance v. Carolina, etc., Ry. Co.*, 94 N. C. 619; *Georgia Ry. Co. v. McCurdy*, 45 Ga. 288; *Filer v. N. Y. Ry. Co.*, 49 N. Y. 47; *Galveston, etc., Ry. Co. v. Smith*, 59 Tex. 406; 2 *Abbott's Law of Corporations*, 598; *Lloyd v. Hannibal Ry. Co.*, 53 Mo. 509; *Taber v. L., D. & W. Ry. Co.*, 71 N. Y. 489; 2 *Wood's Railway Law*, 1129-1130; *Thompson on Carriers*, 226-227; *Beach on Contributory Negligence*, p. 157, Sec. 153; *Thompson on Trials*, Vol. 2, Sec. 1684; *East Tenn. Ry. Co. v. Connor*, 15 Lea. (Tenn.), 258; *Louisville, etc., Ry. Co. v. Stacker*, 86 Tenn. 343; *New York, etc., Ry. Co. v. Colbourne*, 69 Md. 360.

BEACH & HODNETT, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

On the morning of October 28, 1890, appellee was a pas-

senger on appellant's train returning from Broadwell to her home in Elkhart, where it arrived shortly after daylight. She occupied a seat at the rear, or north end, of the chair car, which was crowded. Upon the announcement of the station by the brakeman, and as the train slowed up, she started with her valise in hand to go down the car and out by the forward door, but was somewhat impeded by others coming in. The judgment of witnesses varied as to the time the train stopped, but there was evidence clearly tending to prove that it was short, though before starting up the conductor signaled to the brakeman to know if all the passengers for the station were out and was answered "all right." From their positions neither of them could see the movement of appellee. She got out upon the platform as soon as she could, and then perceived that the train had started, but was moving so slowly that she thought she could step off without danger. The plat introduced by appellant and the testimony of the station agent showed that when she made the attempt it had moved only about two thirds the length of the car, or forty feet, while some others judged it to be farther. In stepping off she was thrown down by the motion of the car, her right arm was broken at the elbow joint, and she was otherwise bruised, cut and injured; for which she recovered in this action judgment upon a verdict for \$3,000.

For reversal of this judgment appellant urges the following points:

First, that the case made by the evidence is fatally variant from that alleged in the declaration; that, according to the allegation, appellee was thrown from the car by its motion, while the proof is that she voluntarily stepped from it.

The statement in the second count is that the train was not stopped a reasonable length of time, but while plaintiff, in the exercise of due diligence and care, was about to alight from the train, the defendant carelessly allowed and caused it to be started and moved, causing her to be thrown with great force and violence upon the platform. It will be

observed that this count does not state in terms, as does each of the other two, that the motion of the train threw her "from" it, but only that it caused her to be thrown, with great force and violence "upon the platform," which does not necessarily exclude the proposition that she voluntarily stepped upon the platform. Her stepping from the car might have been voluntary and yet her fall upon the platform have been directly due to the motion of the car.

If, however, this distinction should be thought too fine to be admitted in favor of the pleader, this objection to the judgment comes too late. It was not interposed to the admission of the evidence, nor among the reasons assigned in writing in support of the motion for a new trial. The fact distinctly appeared from the testimony of the plaintiff herself, who was the first witness examined. Nobody seemed to be surprised by it. On that understanding the trial proceeded and the instructions were expressly based. Had the objection been specifically made at any time before final judgment, it could have been obviated in a few moments by amendment of the declaration. Having submitted the case to the jury without so making it, and taken the chances of a favorable verdict, appellant can not be heard to urge it here. The rule forbidding it is familiar. *O. O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 104; *St. Clair Co. Ben. Soc. v. Feitsam*, 97 *Id.* 474; *Clause v. Bullock Printing Press Co.*, 20 Ill. App. 113; *Start v. Moran*, 127 *Id.* 119; *L. S. & M. S. Ry. Co. v. Ward*, 35 *Id.* 423.

Next, it is insisted that the court erred in giving the fourth and sixth instructions, as asked, for plaintiff. They are substantially the same, and therefore it is sufficient to state one only. The fourth is, "that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistently with the character and mode of conveyance adopted and practicable prosecution of the business, to prevent accidents to passengers riding upon their trains or alighting therefrom."

This is the language commonly used by the courts to set forth the degree of care which the law requires of railroad

companies for the safety of passengers on their trains. But it is said it applies only to the construction and equipment of the road, the employment of servants, and other matters over which the carrier has exclusive control; and that in this case it may have misled the jury to apply it to the voluntary conduct of the passenger, over which the carrier had no control. Such a misapplication seems too unreasonable to be suspected. Had it been otherwise possible, it was fully guarded against by other instructions on both sides which could leave no doubt in the minds of the jurors that if the injury to plaintiff was attributable to her own voluntary act, they should return a verdict for the defendant. The instruction was evidently aimed at the conduct of the company, over which it had entire and exclusive control, namely, the stop of the train at the station. As to that, there was nothing hard or unreasonable in the requirement, which was only to use care, vigilance and foresight to prevent the accident, as it "reasonably" could, considering "the character and mode of conveyance and the practicable prosecution of the business." It called for a stop of no particular length. That might depend on the number of passengers to get off, the condition of the cars, as crowded or otherwise, the impediments caused by others getting on, and other special circumstances; while the practicable prosecution of the business required, with reference to the convenience of passengers going further and to the safety or convenience of other trains, that there should be no needless detention or delay. But it certainly did call for a stop reasonably sufficient, under all the circumstances, to allow passengers for that station, using ordinary diligence and care in getting off, to do so safely. These instructions were properly applicable, and we doubt not were applied only, to the conduct and management of the train.

Lastly, it is complained that the court modified the defendant's instructions numbered respectively 2, 5 and 7.

The second, as asked, was "that it was the duty of the plaintiff to promptly leave the car upon the arrival of the train, and as soon as the train came to a stand at Elkhart;"

to which the court added "if it did come to a stand." We do not believe it was her duty to leave the car quite so soon, nor that the modification, if improper, could do any harm.

The fifth and seventh were in substance alike, and to the effect that if plaintiff heard the announcement of the station duly made, but from bewilderment "or any other cause," failed to get off the train while it was standing there, then it was her duty to remain on it and not attempt to get off while it was in motion, though she believed she could do it safely; and if she was mistaken, and in making such attempt was injured, the defendant was not liable for it. The court modified them by adding the hypothesis "that the train stopped a reasonable length of time to allow passengers, in the exercise of reasonable care and diligence, to get off."

The modification presents the main question in the case. Appellant's contention is that "a passenger who knowingly and intentionally jumps (or we may add steps) from a moving train to prevent being carried past a station where he designed stopping, is guilty of contributory negligence, not as a matter of fact but as one of law."

We understand it to be settled in this State that as a rule negligence, contributory or other, and whether the facts be admitted or proved, is a question of fact. The omission of a duty enjoined, or commission of an act forbidden by statute, are recognized exceptions. So, an act which at once strikes the minds of men in general as desperate or plainly reckless, like jumping from a train moving at the rate of fifty miles an hour, is one about which it might well be assumed that no man fit to be a juror would entertain a question. But no such act is described in these instructions. They describe it simply as jumping or stepping from a car while the train was in motion, and the fact is known to be that it was motion just resumed after stopping, and before the car had been carried beyond the platform of the station at which it had so stopped. Yet counsel have referred us to numerous decisions and treatises as authority for the proposition that such an act is also an exception to the rule. With-

out attempting to review them, or those cited on the other side, we think the weight of authority and reason is against it, and that this is clearly the doctrine of the Supreme Court of Illinois. C. & A. R. R. Co. v. Bonifield, 104 Ill. 223; I. C. R. R. Co. v. Haskins, 115 *Id.* 300.

These instructions, therefore, might well have been refused. The modification brought them into harmony with those given for plaintiff and set forth the court's theory of the case, which was, that if the injury was attributable to the voluntary act of the plaintiff alone, without fault on the part of the defendant (and none was charged, except the failure to stop the train for a time reasonably sufficient to allow her, by using due care and diligence, to get off while it was standing), then she alone must suffer the consequences of her act, whether it was or was not ordinarily careful. In that case, the defendant would sustain no more relation to it than would the other passengers or any stranger. But if it was the negligence of the defendant that raised the question whether she should remain on the train or attempt to get off while it was in motion, and necessitated her judgment and action thereon, and she judged and acted as ordinarily careful persons generally would in like circumstances, then the injury was not attributable to any fault on her part, but to the negligence of the defendant. While her act was of her own will, the circumstances which required her to act, and limited her to one of two only, were the direct and immediate result of its fault. If she could have had her own will, she would neither have remained on nor got off the moving train; and she would have had it, as was her right, if defendant had done its duty to her.

We think that was a correct view of the law. I. C. R. R. Co. v. Able, 59 Ill. 132; C. & A. R. R. Co. v. Bonifield, *supra*; C. & E. I. R. R. Co. v. O'Connor, 119 Ill. 586.

The questions of fact—whether defendant was negligent, and plaintiff acted with ordinary care—were fairly submitted to the jury, and their finding seems to have been fairly supported by the evidence. Perceiving no material error in the record, the judgment will be affirmed.

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1. *Practice—Pleading—Withdrawal of a Count—Effect of, etc.*—The withdrawal of a count in a declaration, though a disclaimer of all right to recover under it, does not take it out of being as a subject of reference. It can not thereafter operate *per se* as an averment of anything in the suit, but it is still in existence and a part of the same paper with the other counts.

2. *Ibidem.*—Where the beginning of the first count of a declaration in case was as follows: “In the Macoupin County Circuit Court, State of Illinois, February term, 1891, Emmet T. Rice, the plaintiff, by R. B. Shirley, his attorney, complains of the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, defendant, of a plea of trespass on the case, for that, whereas,” etc., alleging that the defendant on a day mentioned, etc. And the beginning of second count was as follows: “And whereas also the said defendant before and on the day aforesaid, in the county, was a railroad corporation,” etc. And upon the trial the plaintiff withdrew his first count. *It was held*, that the withdrawn count was still in the case for the purpose of reference, containing as it did the statement of a certain time and place of certain alleged occurrences, and that the second count might properly, by clear reference, incorporate them in its own averment of other occurrences.

3. *Verdict—Conflicting Testimony.*—Where the evidence is conflicting and the jury find a certain way, if there was evidence enough to support their finding it will not be disturbed.

4. *Railroads—Injury to Stock on the Track—Engineer's Duty.*—Whenever the danger of a collision between a railroad train and horses upon the track becomes apparent, whether by their coming upon the track through no fault of the company, or otherwise, it is the duty of the engineer to use whatever appropriate means he reasonably can to prevent or avoid the collision and injury.

Memorandum.—Action for injuries to stock. Appeal from a judgment for the defendant rendered by the Circuit Court of Macoupin County; the Hon. JAMES A. CREIGHTON, Circuit Judge, presiding. Heard in this court at the May term, 1891, and approved. Opinion filed October 24, 1892.

The opinion states the case.

Instruction referred to in the opinion of the court:

The court instructs the jury, that although they may believe from the evidence that the engineer of the defendant's train saw a number of horses grazing on the defendant's right of way, near the line of its track, before they came onto the track, then he would not be required to

sound the alarm whistle or stop the train (until they came upon the track) and the danger of striking them became apparent, and if the jury believe from the evidence in this case that the defendant's servant, the engineer (as soon as the horses came on the track), used all reasonable diligence to alarm said horses and stop the train, and did stop the train as soon as it could have been done by the exercise of due diligence, then the defendant in this case can not be held guilty of negligence; and if the jury so believe from all the evidence in the case, they should find the defendant not guilty.

The court refused to give the above instruction as asked by the defendant, but gave the same in a modified form, as follows:

The court instructs the jury that, although they may believe from the evidence that the engineer of the defendant's train saw a number of horses grazing on its right of way near the line of its track, he would not be required to sound the alarm whistle or stop the train until the danger of striking them became apparent; and if the jury believe from the evidence in this case that the defendant's servant, the engineer, as soon as the danger of striking the horses became apparent, used all reasonable diligence to alarm said horses and stop the train, and did stop the train as soon as it could have been done by the exercise of due diligence, then the defendant in this case can not be held guilty of negligence, and if the jury so believe from all the evidence in this case, they should find the defendant not guilty.

APPELLANT'S BRIEF.

"In framing a second or subsequent count for the same cause of action, care was and still is essential to avoid any unnecessary repetition of the same matter; and by an inducement in the first count, applying any matter to the following counts, and by referring concisely in the subsequent counts to such inducement much unnecessary prolixity may be avoided; and this is usual in actions for words, and proper to be attended to in all cases. But unless the second count expressly refers to the first, no defect therein will be aided by the preceding count; for though both counts are in the same declaration, yet they are for all purposes as distinct as if they were in separate declarations and consequently they must independently contain all necessary allegations, or the latter count must expressly refer to the former." Chitty's Plead., Vol. 1, Sec. 414.

"When the plaintiff makes two or more different state-

ments of one and the same cause of action each several statement is called a count and all of them collectively constitute a declaration. In all cases, however, in which there are two or more counts, whether there is actually but one cause of action or several, each count purports upon the face of it to declare distinct right of action unconnected with that stated in any of the other counts. Bouvier's Law Dictionary, 323.

"Nothing can be intended after verdict but what was expressly stated in the record or necessarily implied from those facts which were stated." I. T. Rep. 141, Tidd's Practice, 9th Ed. 919. "If a declaration contains several counts, any of which is wholly defective, and general damages upon the whole declaration be given, the judgment will be arrested or reversed on error." Chitty's Plead., Vol. 1, 682.

"The owner of cattle killed at a railroad crossing must prove by the preponderance of the evidence that his cattle were killed by the negligence of the employes of the road." T. H. & I. R. R. Co. v. Tuterwiler, 16 Brad. 197; Jacksonville G. L. & C. Co. v. Barber, 16 Brad. 206.

The instructions of the court should be restricted to the issues made by the evidence and pleadings. Nollen v. Windsor et al., 11 Ia. 190; Iron Mountain Bank v. Murdock, 62 Mo. 70; Hall v. Strode, 28 N. W. Rep. 312. When the declaration alleges negligence of the defendant as the ground of liability it is a fatal objection to the instructions that they direct the attention of the jury to other and different elements of liability. Chi. & Alton R. R. Co. v. Mock, 77 Ill. 141; Colum. C., C., & I. R. R. Co. v. Twesh, 68 Ill. 545.

JOHN T. DYE and A. N. YANCEY, attorneys for appellant.

APPELLEE'S BRIEF.

Even if a railroad is fenced and though stock get on where the company is not bound to fence, yet the employes must use ordinary care and diligence to avoid injuring stock which may be on the road. Ill. Cent. R. R. Co. v. Middleworth, 46 Ill. 494; Ill. Cent. R. R. Co. v. Baker, 47 Ill. 295.

Where stock are upon the track and a train is approaching, though down a slight grade, and the engine driver, instead of stopping his train, pursues them to a point on the track where there is little probability the animals will leave the track, and they are overtaken and killed, the company is guilty of gross negligence notwithstanding it may appear the animals got on within the limits of a town. Ill. Cent. R. R. Co. v. Baker, 47 Ill. 295.

Where stock is killed on a railroad and the engineer could, by the use of ordinary care and skill, without danger, have stopped the train in time to avoid the collision, although the animals were wrongfully on the track, the company is nevertheless liable. T., P. & W. R. R. Co. v. Bray, 57 Ill. 514; T., P. & W. R. R. Co. v. Ingraham, 58 Ill. 129; P. & D. R. R. Co. v. Mullins, 66 Ill. 526.

Where stock get on a railroad track in the day time and can be seen by the engineer half a mile, it is gross negligence not to slacken the speed of the train in time to avoid the danger. Chicago & N. W. Ry. Co. v. Barrie, 55 Ill. 226; Rockford, R. I. & St. L. R. R. Co. v. Linn, 67 Ill. 109.

It is a settled principle by the courts in this State, in a long line of decisions, that where the evidence is conflicting the verdict will not be disturbed unless it is manifestly against the weight of the evidence. Jacquin v. Davidson, 49 Ill. 82; City of Chicago v. Torgerson, 60 Ill. 200; City of Galesburg v. Higby, 61 Ill. 287; Fitch v. Zimmer, 52 Ill. 126; Chicago A. & St. L. R. R. Co. v. Stover, 63 Ill. 358.

"The question of negligence is one of fact which must be left to the jury for determination." Northern Line Packet Co. v. Binninger, 70 Ill. 571.

R. B. SHIRLEY, attorney for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

Appellee recovered judgment below for \$225 damages for the loss of two horses killed on the track, and by a train of appellant.

The declaration contained two counts, one charging neglect to erect and maintain sufficient fences, under the statute, and the other carelessness in the management of the train, to which the defendant pleaded not guilty. Just as the trial was about to commence, or just after it commenced, on leave of court obtained over a general objection, plaintiff withdrew the first count, and it is claimed that this left the second without any statement of venue, title, parties, time or place. Nevertheless, the defendant went on and tried the case on the general issue, taking its chances of a favorable verdict.

If the declaration was in fact left, by the withdrawal of the first count, without any statement of these matters, we are of opinion that, whether they were formal only or substantial, such omission was cured by the verdict, because the issue joined required proof of them, without which it is not to be presumed that the judge would have allowed or the jury given the verdict that was returned. 1 Chitty on Pl. 673.

But we do not concede that it was in fact so left. It begins thus: "In the Macoupin County Circuit Court, State of Illinois, February term, 1891, Emmet T. Rice, the, plaintiff, by R. B. Shirley, his attorney, complains of the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, defendant, of a plea of trespass on the case." We understand that these statements, in a declaration containing several counts, are distinct from each but applicable alike to all. They set forth the title of the court, venue, names of parties and form of action, but no cause of action. That is reserved for the counts respectively, which should also state directly or by reference, the time and place of occurrence of the several facts relied on as constituting it. The first count follows, beginning, "For that whereas," etc., alleging that the defendant, *on a day mentioned*, was a railroad corporation, operating a railroad through *the county named*, and which had then been open for use more than six months; that it neglected to fence, and that, by reason thereof, plaintiff's horses then and there strayed and

went upon the road where it ought to have been fenced, and so were struck by defendant's engine and killed.

The second count, beginning "and whereas, also," avers that "the defendant before and on *the day aforesaid*, in the *county aforesaid*, was a railroad corporation," etc., and the other facts as having occurred "then and there." The withdrawal of the first count, though a disclaimer of all right to recover for the negligence therein charged, did not take it out of being, as a subject of reference. It could not thereafter operate *per se* as an averment of anything in this suit, but it was still in existence and a part of the same paper with the second count. Containing, as it did, the statement of a certain time and place of certain alleged occurrences, the second count might properly, by clear reference, incorporate them in its own averment of other occurrences. In this case there can be no doubt as to the reference intended.

The evidence shows that the horses in question were being kept in a well fenced pasture of H. S. Dorsey, east of and adjoining the town of Gillespie; that they escaped during the night of July 23, 1890, through a gate opening on a highway about twenty rods from the railroad, and were killed at a culvert a mile and a quarter west of the station by a freight train of twenty-six loaded cars, going west, at about sunrise on the following morning. Their escape is not attributed to any negligence of appellee, who was then in Cincinnati, or of Mr. Dorsey, who had stock of his own and of other parties in the pasture and took good care to have it safe for them. How the gate came to be opened did not appear.

Besides the engineer and fireman, whose testimony, if true, would fully exonerate the railroad company, only one witness was introduced who claimed to have seen the killing, and he claimed to have seen it from the window of an upper room in a farm house an eighth of a mile from the culvert. The other evidence on the part of the appellee was circumstantial—relating mainly to the whistling heard and the horse tracks seen.

It appears that the railroad from Gillespie to the culvert is straight, on a level prairie, with nothing to obstruct the view from a train of the whole right of way. There was a public crossing west of the station, not over a quarter of a mile distant, and a private crossing about ten telegraph poles east of the culvert. The distance between poles was variously stated at 150 to 180 feet. Appellee's horses, running west, were overtaken at the culvert. One was knocked off the track and died soon after; the other was cut in two and part of the carcass carried something more than the distance of four telegraph poles beyond the culvert.

The engineer testified that he whistled for the crossing just west of the station; that he saw six or eight head of horses on the south side of the track; that a mile and a half west he saw them come upon the track; that they came about thirty-five feet ahead of the engine and about one hundred yards east of the culvert; that as soon as they came up he gave the signal of alarm—a succession of short whistles—called for brakes, reversed his engine and stopped about one hundred and fifty feet west of the culvert; that he was then running at the rate of ten or twelve miles an hour, and that from the time they came on the track he could not have stopped the train before it reached the culvert. As to all these particulars he was corroborated by the fireman. Neither of them intimated that after the whistling for the public crossing near the station there was any slacking of speed or any alarm given until the train was only about three hundred feet from the culvert, or that the horses came on the track until then, and then only about thirty-five feet in front of the engine. If they did not positively assert, they clearly imply the contrary. But they were distinctly contradicted by four, if not five disinterested witnesses as to the whistling and by three of them also as to where the horses were on the track. The attention of Mr. Dorsey and Mr. Francis was attracted by the short, rapid, stock-alarm whistling, which must have been begun after the train passed the public crossing, and when three-quarters of a mile from the culvert, which was continued for quite a while and after

an intermission renewed when near it. John Smith, a farmer living an eighth of a mile from the culvert, was just getting out of bed when he heard this whistling, continued, as he says, something like a minute or two. Mr. Harms, living with him, was awakened by it, got up after hearing it twice and went to the window, from which he saw the train, about a quarter of a mile from the culvert, and a bunch of horses running ahead of it, about forty-five or fifty yards, some on the track and some on the sides of it, and watched them until they were struck. Mr. Dorsey and Mr. Francis, who were there directly afterward, saw tracks of horses running west, and barefooted, as were plaintiff's, two telegraph poles east of Mr. Francis crossing, and twelve (being over 2,000 feet) east of the culvert. They went no further east to look for tracks. At about the distance from the culvert that the engineer says they came on the track, these witnesses saw where one went off. Mr. Dorsey did not examine the track between these points, but Mr. Francis walked the whole of it, and his recollection is that the horse tracks were on it all the way. This testimony can not be reconciled with that of the train hands. If true, it tends to show that the danger to these horses must have been apparent to the engineer from a point at least half a mile east of the culvert, within which distance he could easily have put the train under control sufficient to stop whenever it should reasonably appear to be necessary in order to avoid it; and whether he failed to do it and such failure was culpable negligence, were questions for the jury. We think there was evidence enough to support their finding.

It was said that there was no evidence in the record tending to show that the appellant was in any way connected with the injury complained of. In making that point, however, counsel were thinking only of the evidence on the part of the plaintiff; for it was very clear that if he did not prove it the defendant did, most distinctly, by half a dozen of its employes, including the engineer and fireman.

We see no error in the refusal of the court to admit evidence that the railroad was well fenced. The direct issue

on that point was eliminated by the withdrawal of the first count, and it does not appear that this evidence might have been material to the issue on the second. It was not submitted to the jury by the first instruction for plaintiff. The sufficiency of the fence was rather thereby admitted.

Two instructions were asked and given for the plaintiff, the first of which is criticised for ambiguity. We perceive in it no such want of clearness as might mislead the jury. The rule of law announced in it is substantially conceded by the first, asked and given for the defendant, and in our judgment is correct.

For defendant the court was also asked to instruct absolutely to the effect that the engineer, seeing horses grazing on the right of way near the track, would not be required to sound the alarm whistle or stop the train until *they "came upon the track, and the danger of striking them became apparent;"* which the court modified by striking out the words in italics, and gave as so modified. Of this action serious complaint is made. We think it groundless. The instruction as asked was of the old-fashioned kind, given when the courts assumed to tell the jury that specific acts or omissions were or were not negligent. It assumes that the horses were seen to be only grazing until they came upon the track, and that the issue was whether the engineer ought to have sounded the alarm whistle or stopped the train sooner than he did, whereas, the real issue was whether there was a want of ordinary care in the management of the train—culpable negligence—whether in failing to whistle, or to stop, or to slow up, or otherwise, causing the injury. We think the law is and ought to be that whenever the danger of collision becomes apparent, whether by their coming upon the track or otherwise, it is the duty of the engineer to use whatever appropriate means he reasonably can to prevent or avoid it.

On the whole, the instructions given for the defendant were favorable, as the law would warrant, and the case required.

Seeing no substantial error in the record we must affirm the judgment.

City of Jacksonville v. Headen.

1 *Judgment Erroneous—Amendment at a Subsequent Term of Court—Practice—Additional Record.*—A judgment was entered against the city of Jacksonville for costs in a suit for a violation of an ordinance. Pending an appeal, at a subsequent term of the Circuit Court the cause was redocketed, and on motion of the defendant, an order was made amending the judgment by striking out so much of the record as related to costs; then an additional record was filed in the Appellate Court showing the motion, the hearing by the court of the arguments of counsel, the rulings allowing the motion, etc., to which rulings the plaintiff then and there excepted, etc. It was held that the amendment was proper.

2. *Disorderly Conduct.*—It is not the law that any threatening or insulting word, gesture or motion amounts to disorderly conduct. It may be of such a character or so provoked or conditioned as to be fully justified.

3. *Disorderly Conduct—What is, etc.*—A farmer who resided in Morgan county more than half a century, and notwithstanding some habits not to be commended, was upon the whole a respectable man and good citizen, went to Jacksonville, where he took one drink of whisky and two glasses of beer, was a little loud in a political discussion and swore some about the tariff, but according to the great preponderance of the evidence, he was not intoxicated, used no obscene language, and showed no disposition to harm anybody. *It is held*, that the verdict of jury finding that he was not guilty of violating an ordinance of the city against conducting himself in a disorderly manner would not be disturbed.

Memorandum.—Action for a violation of a city ordinance. Appeal from a judgment for the defendant rendered by the Circuit Court of Morgan County, the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the May term, 1891, and affirmed. Opinion filed October 24, 1892.

APPELLANT'S STATEMENT OF THE CASE.

Thomas C. Headen was arrested on August 9, 1890, without a warrant, by a police officer of the city of Jacksonville, who lodged against him three charges, namely: drunkenness, disorderly conduct, and obscene and profane language, tending to disturb the peace. On the trial of the case before a justice of the peace, he was found guilty of each offense charged, and was fined \$9, with costs of suit. In the Circuit Court the cause was tried before a jury,

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on appeal, and the defendant, Headen, was acquitted, and judgment rendered for the defendant against the city in bar and for costs.

At the following term of the Circuit Court, on motion of the defendant, the cause was re-docketed and an order made amending that record by striking out that part of the judgment relating to costs.

APPELLANT'S BRIEF.

For the city, we contend that drunkenness is provable by opinion.

"The opinion of an ordinary witness as to whether a certain person was sober or intoxicated is admissible." Lawson on Expert and Opinion Evidence, page 473, sub-rule 3. "Whether a person is nervous, or excited, or calm, or whether drunk or sober, are facts patent to the observation of all, and their comprehension requires no peculiar scientific knowledge." *Dimmick v. Downs*, 82 Ill. 570, 572.

On a trial for murder, a witness testified that he saw the defendant at the time of the killing. He was then asked: "From his conduct and deportment, and other facts connected with it, state whether, in your judgment, he was to any considerable extent under the influence of intoxicating liquors." His answer was excluded. *Held*, error. *People v. Eastwood*, 14 N. Y. 562; Lawson, Expert Evidence, page 475.

"Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct." *People v. Eastwood*, 14 N. Y. 562.

"A witness may state whether or not a person had the appearance of being intoxicated, and such a statement of appearance would be the statement of a fact. Facts which are latent in themselves, and only discoverable by way of appearance more or less symptomatic of the existence of the main fact, may, from their very nature, be shown by the opinions of witnesses as to the existence of such appearance or symptoms. Sanity, intoxication, the state of health or

of the affections, are facts of this character. 1 Greenleaf, Evidence, Sec. 440a." City of Aurora v. Hillman, 90 Ill. 61, 66.

RICHARD YATES and FRED. H. ROWE, attorneys for appellant.

APPELLEE'S BRIEF.

Sec. 40 of Chapter 53 of the Revised Statutes, quoted and referred to in Town of Nokomis v. Harkey, 31 App. Ct. Rep., p. 107, does not in terms apply to courts of record. That section, as amended by the laws of 1873 (see Session Laws 1873, page 93, same as Session Laws 1871-2, p. 420), applies only to justices of the peace and constables.

OSCAR A. DELEUW and F. D. McAVOY, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

Appellee was arrested without warrant by a police officer of the city, who lodged charges against him for violation of the ordinances in three particulars, namely (1), being found in a state of intoxication in a public place in said city; (2) using obscene language in such manner as to disturb the peace and quiet of the neighborhood or of those passing through the streets; and (3) conducting himself in a disorderly manner in a public place in said city. From the judgment of the justice of the peace an appeal was taken to the Circuit Court, and on trial by jury the defendant was acquitted, a motion for a new trial overruled, and judgment entered against the plaintiff in bar and for the costs.

An additional record was filed in this court, from which it appears that at the following term of the Circuit Court, on motion of the defendant, the cause was there re-docketed and an order made amending the record by striking out so much of it as related to costs.

Appellant claims that the judgment was not amendable in that particular, on motion, at a subsequent term, and that

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the additional record does not show any notice to plaintiff of the motion to amend.

The additional record shows the motion, the hearing by the court of the arguments of counsel thereon, and the rulings allowing the motion and ordering the amendment, and then proceeds as follows: "To which rulings and orders of the court the plaintiff then and there excepted and does still except. And plaintiff prays an appeal to the Appellate Court, which appeal is granted, and bill of exceptions to be signed in fourteen days by consent of parties." Then follows the certificate of the clerk that "the above and foregoing is a full, true and complete copy of the record in the case of The City of Jacksonville v. Thomas C. Headen (re-docketed) in said Circuit Court, at the May term, A. D. 1891, of said court." The "above and foregoing" does not include any appeal bond or bill of exceptions; and since the grounds on which the amendment was ordered do not appear, we must presume it was properly shown that the court at the preceding terms did not in fact adjudge costs against the city, and that the error in the record was clerical. Nor does it appear that any objection to the allowance of the motion was made on the ground that proper notice of it had not been given. It seems that counsel for the plaintiff was present and heard on the motion. We therefore hold the amendment proper.

On the issues of fact forty-four witnesses were examined, of whom thirty-seven were introduced by the defendant. There was evidence, and not a little, clearly tending to disprove each of the charges. In view of the character and amount of it, the alleged errors on the action of the court are deemed unimportant to consider at any length. It is not clear that the court did exclude the opinion of any witness, as opinion founded upon any proper basis on the question of defendant's intoxication. Mere guesses, from appearances which might as well be due to other and innocent causes, were not proper evidence. All of the facts from which a judgment that he was intoxicated could be formed were before the jury, and the suspicion or guess of a witness

who knew only such as of themselves were not a sufficient basis for an opinion could not aid them. Such was the case of Henderson. After stating the facts he observed, he was asked to state "whether or not the defendant was under the influence of liquor, and if so, to what extent," and answered, "I had not seen him drinking any and I could not say." He evidently understood that the appearances he had observed and stated might as well be due to other causes, and hence could form no admissible opinion as to what in fact caused them. The "opinion" of the witness, Woods, who was introduced by defendant, was objected to by plaintiff and excluded. These are the only instances mentioned in which the court so ruled. They must have been considered as exceptional, since in many others it was admitted. Counsel concedes that the preponderance of the evidence admitted on the question of defendant's intoxication was in his favor. They say the jury "should have acquitted as to drunkenness (and perhaps as to obscene language), but they should have convicted as to disorderly conduct." We think no evidence offered that was material, or might have led to a different finding upon those charges, was excluded.

It is said that in failing to convict of disorderly conduct the jury must have ignored the evidence for plaintiff, and that this may have been induced by the action of the court in its ruling upon instructions asked by plaintiff. Among these were three, alike in substance and form except as they applied respectively to the different charges, and the court gave those relating to intoxication and the use of obscene language, but refused that relating to disorderly conduct. The suggestion is that the court having thus called the attention of the jury to the two and ignored the third, it is not surprising that they also ignored it.

By the ninth instruction given for plaintiff as asked, and which immediately preceded the three referred to, the jury were told that the city was prosecuting for violations of the ordinances in three ways, stated as herein above set forth; and that even if the evidence may have failed to

convict of some one, yet if it proved the defendant's guilt of the others or either of them it was the duty of the jury to find him guilty of the offense or offenses so proved and impose a fine or fines accordingly. The three following added to this a short statement of what would constitute the offense therein respectively mentioned, the limit of the fine for its commission and the form of a verdict of guilty. In the one refused the offense was defined as "any action or speech tending or calculated to produce or encourage violation or breach of public or municipal order," and declared that "if the evidence in this case shows that defendant, at or immediately before the time of his arrest, made use of insulting or threatening words, gestures or motions toward a police officer of said city, in a public place, this would constitute disorderly conduct."

It could not have been known to the jury that such an instruction or that any instruction relating to disorderly conduct had been asked and refused. Such refusal, therefore, could not have led them to infer that the court ignored that charge. It was expressly submitted to them in another with all the evidence offered upon it. This one may have been refused for the reason that the definition of the offense as applied to this case was too broad and absolute. We apprehend it is not the law that every threatening or insulting word, gesture or motion, even toward a policeman, amounts to disorderly conduct. It may be of such a character, or so provoked or conditioned as to be fully justified; and had the instruction been given with the qualification required by the evidence, we think the finding should have been as it was.

The disorderly conduct charged is said to have consisted in threatening and striking the officer. Only two of the witnesses said anything about his threatening. Henderson met Hughes and Estaque (another policeman) at the southwest corner of the square, and testified that while he was talking with them "the defendant came up, shaking his fist and making some threat—he didn't want him to follow him around." Vasconcellos says, "I was just passing and

saw Headen approach Hughes a number of times, two or three times anyway, shaking his fist at the policeman and making some threats. This drew my attention and I stopped to listen. Headen said he didn't care if Hughes was a policeman, he didn't want him to bother him, and he would settle him, fix him, and all such remarks as these. He seemed to be excited and spoke to him rather rough." That is the whole of the evidence on the subject of defendant's threats. Neither of these witnesses professed to give his words or any of them, nor did they know the circumstances which occasioned them. Hughes and Estaque knew them all and did profess to state his language, but neither of them intimated that he made any threat. The striking must have been done just before the other two came up, or they failed to notice it. There was no anger or intentional offense in it. Estaque says; "I think Hughes did not take it as a personal grievance." Hughes himself says they were friends; had been on the best of terms. These officers had met him only ten or fifteen minutes before at the northwest corner of the square. He had been drinking enough to be felt, had just come out of a saloon, and was talking politics somewhat loudly, as his manner was when on that subject. Estaque, who was near, talking with Hughes, presumed to rebuke him for an expression he used, which, though not nice, was neither profane nor obscene, and ordered him to be quiet. This provoked Headen, who spoke of it complainingly to Hughes, as Estaque turned and went away. Hughes advised him to the same effect, but in an entirely friendly manner, and also went away. When Headen again met him, ten or fifteen minutes later, his mind recurred to the incident. Hughes was talking with Mr. Glossop. Headen walked up to him, pushed him in the side, took hold of him, and began to swear about Estaque, the tariff and the republican party. That was the striking referred to. Evidently it was a liberty taken as a friend. Hughes did not understand it as intended to be offensive, though it was rough and disagreeable enough to be checked. And so he said: "Come, Headen, that is enough of that. You go on now

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and behave yourself, or I shall have to arrest you.” Glosop says that “Haden turned away laughing, and apparently good natured. But perceiving that the officer was serious, and nettled by the threat of arrest, in a few moments he went up to him once and again and with some warmth of manner told him to arrest him if he wanted to, and thereupon he was taken by Hughes and Estaque to police headquarters and the complaint was made.”

Defendant was a farmer who had resided in the county fifty-four years, and, notwithstanding some habits which are common enough, though not to be commended, was, on the whole, a respectable man and good citizen. On the occasion in question he had taken one drink of whisky and two glasses of beer within two or three hours, and was a little loud in political discussion; but according to a great preponderance of the evidence he was not intoxicated, used no obscene language, and showed no disposition to harm anybody. We see nothing in his conduct of a criminal or *quasi* criminal character. The interference of the officers seems to have been ill judged, and the jury disposed of the case rightly. Judgment affirmed.

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1. *Commissioners of Highways—Injunction.*—Where the commissioners of highways in repairing a highway were about to fill up a ditch, they were restrained from so doing by an injunction. In their answer to the bill they answered that they were not merely intending to fill up the ditch, but also to put a culvert across the road so that the water from the complainant's tile drain could flow in its natural course, as it did before the road was graded up. The evidence showed that they were putting in the culvert when the writ was served and it was conceded that by a culvert at that place the water would flow in its natural course. *It was held*, that the injunction was properly dissolved. It was the duty of the commissioners under the statute, which gave them charge of the road and required them to keep it in repair, to improve it as far as practicable.

Memorandum.—Injunction. Appeal from the Circuit Court of McLean County; the Hon. OWEN T. REEVES, Circuit Judge, presiding. Heard

in this court at the May term, A. D. 1891, and affirmed. Opinion filed October 31, 1892.

APPELLANT'S STATEMENT OF THE CASE.

This is a proceeding begun by appellant to restrain Stack (pathmaster) and the commissioners of highways, from interfering with or filling up an open ditch in the highway running along the south side of his farm. The ditch had been open and the water that flowed through the same had been running there for more than twenty-five years, into which appellant emptied a tile drain from his farm.

APPELLANT'S BRIEF.

Of the owner of the fee in highway—his dominion over the land and everything connected therewith is as absolute and complete after the road is laid out upon it as it was before, except that he must submit to the public's right of passage upon it and to the incidental right which the proper public officer has of taking timber, stone or gravel which he may find within the limits of the highway, and use the same in a reasonable and proper manner to keep the highway in proper repair. *Kreuger v. The Town of Palatine*, 20 Ill. App. 423, 121 Ill. 72.

"The owner of a fee in the right of way, may carry pipes beneath it or run a drain under it." *Angell on Highways*, Secs. 302, 319; *Berly v. Chander*, 6 Mass. 454; *Chamberlain v. Enfield*, 43 N. H. 350; *Holden v. Shattuck*, 34 Vt. 536; *Palmer v. Silverthorn*, 32 Penn. 65; *Overman v. May*, 35 Iowa, 89; *Comr. v. Beckwith*, 10 Kas. 603; *Wooding v. Fork Tp.*, 28 Pa. St. 355; *Kellogg v. Thompson*, 66 N. Y. 88; *Brookfield v. Walker*, 100 Mass. 94; *Thompson on Highways*, pages 27, 28, 29, 407, 408.

Appellant, as the owner, has the unrestricted right to drain for agricultural purposes, as the water is in fact surface water, having no definite source or channel. *Woffle v. R. R. Co.*, 38 Barb. (N. Y.) 413; *Cott v. R. R. Co.*, 36 N. Y. 217; *Sweet v. Cotts*, 50 N. H. 429; *Popplewell v. Hodgkinser*, 20 L. T. N. S. 578; *Goodal v. Tuttle*, 29 N. Y. 459; *Bufforn v. Horns*, 5 R. I. 253; *Curtiss v. Ayrault*, 47 N. Y. 73.

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The public only had an easement and the right to flow water down the ditch by appellant, and the same being on his own land was to this extent a relinquishment of so much of the easement as might be necessary for that purpose. Washburn on Easements, 506; Loggins v. Inge, 7 Bing. 682; Winter v. Brockwell, 6 East, 308; Morse v. Copeland, 2 Gray (Mass.), 302; Elliott v. Rhett, 5 Rich. 405, 418, 419; Dyer v. Sanford, 9 Met. (Mass.) 395.

TIPTON & PEIRCE, attorneys for appellant.

APPELLEES' BRIEF.

"A board of commissioners of highways can not grant away the use of the right of way of the public highway to a private person, and the right to perpetually flood the land of another can only be acquired by grant or prescription." Johnson v. Rea, 12 Brad. 331.

"A prescription can not be for anything which can not be raised by grant, for the law allows a prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have been made." "As an incorporated town or city holds the title to its streets and alleys for the use of the public, and has no authority to grant them away for any purpose inconsistent with the public use, it follows that an individual can not acquire a prescriptive right therein for private use. City of Quincy v. Jones, 76 Ill. 232; 2 Blackstone (Sharswood's Ed.) 263; City of Alton v. Ill. Trans. Co., 12 Ill. 37-60; Kreigh v. City of Chicago, 86 Ill. 407; Johnson v. Rea, 12 Brad. 331; C. & N. W. R. R. v. Hoag, 90 Ill. 339-351; Lee v. Town of Mound Station, 118 Ill. 304-316; Logan County v. City of Lincoln, 81 Ill. 156.

"It seems well settled that an adverse right to an easement can not grow out of a mere permissive enjoyment for any length of time." City of Quincy v. Jones, 76 Ill. 231, 244; First Parish v. Beach, 2 Pick. (Mass.) 60; Medford v. Pratt, 4 Pick. (Mass.) 222; Parker v. Farmingham, 8 Metc. (Mass.) 260; Thomas v. Marshfield, 13 Pick. (Mass.) 240.

The right to perpetually flood the land of another can only be acquired by grant or prescription. *Woodard v. Seeley*, 11 Ill. 157; *Tanner v. Valentine*, 75 Ill. 624.

Where the allegations of the bill are such as do not charge a nuisance, *per se*, is about to be committed by public officers in the performance of discretionary duties, a court of equity will not enforce their proposed action until the question of nuisance has been determined by suit at law. *Thornton v. Roll*, 118 Ill. 350, 364; *Dunning v. City of Aurora*, 40 Ill. 481; *Owens v. Crossett*, 105 Ill. 355; *Brush v. Carbondale*, 78 Ill. 75; *Patterson v. C., D. & V. R. Co.*, 75 Ill. 588.

There is no charge in the bill and no evidence offered that these defendants are insolvent. In order to maintain injunction where the threatened act would not create a nuisance *per se*, such charge and evidence are essential. *Owens v. Crossett*, 105 Ill. 355; *Thornton v. Roll*, 118 Ill. 350; *Bliss v. Kennedy*, 43 Ill. 68.

"Commissioners of highways have no right, in draining a road, to collect water, and carry along the road a quantity of water which would naturally drain off in another direction, and discharge it on an adjoining farm." *Young v. Commissioners of Highways*, 25 N. E. Rep. 689; *J., N. & S. R. R. Co. v. Cox*, 91 Ill. 500; *Nevins v. City of Peoria*, 41 Ill. 502.

"There could not be an estoppel *in pais* as against appellant because the appellee has expended money in pursuance of the agreement; for it very well knew such an agreement on the part of the commissioners was beyond their power and void." *Town of Rice v. C. B. & Q. & N. Ry. Co.*, 30 Ill. App. 481-488.

The owner of the dominant estate can not drain so as to create new channels upon or over the servient estate. *Commissioners of Highways v. Whitsit*, 15 Brad. 318; *Peck v. Herrington*, 109 Ill. 612.

The commissioners of highways can not estop themselves or the public of the right to exercise their power to fill up an open ditch on a highway which does not run in a natural water course. *Johnson v. Rea*, 12 Brad. 331.

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The digging of a ditch in a highway other than in a natural water course or drainage channel is of itself an injury to the highway. *Town of Canoe Creek v. McEniry*, 23 Ill. App. 227.

“The right to lay a tile drain for private purposes along a highway is one which the commissioners of highways have no power to grant. The right to dig and maintain such a drain is such a right and interest in land as can not be given by parol but must be created by deed.” *Murray v. Gibson*, 21 Ill. App. 488.

It is negligence, for which the commissioners of highways are personally liable, to leave an open ditch in a highway. *Skinner & Cannon v. Morgan*, 21 Ill. App. 209.

NEVILLE & LINDLEY, counsel for appellees.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

This was a bill to enjoin the commissioners against filling up an open ditch in the highway on the section line between sections 1 and 12 in the town of Towando. On final hearing upon the pleadings and proof, it was dismissed, and from that decree complainant appealed.

Appellant owns the east half of said section 1, on which he has resided ever since 1866. Appellees Carmody and Kinsella, respectively, own land adjoining the highway on the south—that of the former being the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 12, and that of the latter the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of said section. On appellant's land is a low basin which naturally drained south across the highway upon the land of Kinsella. But since the road was graded and rounded up, more than twenty years before the commencement of this suit, none has flowed across it. In throwing up the earth from the north side, a ditch was left there which has since been made wider and deeper by work in cleaning out and by the flow of water therein. It is now two and a half or three feet in depth and five or six in width at the top, and six or eight from the north line of the high-

way. When the road was graded up, the old culvert across it by which the water from appellant's basin passed on to Kinsella's land was taken out, and from that time it all flowed west in the open ditch to another culvert sixty rods or more west of the one referred to, by which the water, together with water from the west, flowed across the road upon the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 12, now owned by Carmody, but then by Talkingham, and southeasterly over it to the natural water course or depression on Kinsella's land.

In 1878 appellant laid a tile drain in the western part of his land from a point almost due north of this west culvert to the ditch at that point, and by agreement with Talkingham, helped him to pay for a larger drain on his land than he had intended to put in. He also soon afterward tiled from the basin spoken of, in the natural course of drainage, to the ditch at the point where the east culvert had been. This has so increased the water flowing to the west culvert as to overflow at times the tile drain of Talkingham, now Carmody's. And since that is not the natural course of that water, Carmody notified the commissioners to fill up or dam the open ditch, to protect him from it. Of this they advised appellant, who, according to the testimony of one of them, consented to have it done. Thereupon they filled the ditch just west of the tile mouth and were putting in a wooden culvert about where the old one was, when appellant took out the dam and brought this suit, enjoining them against any interference with the ditch.

Appellant claims the right to have it kept open for the drainage of his land, on several grounds.

First, by virtue of his title to the north half of the highway. He insists that this is subject only to the easement of the public, and that he may lawfully do with or upon that part of the highway what he will that is not incompatible with the reasonable enjoyment of such easement, and that the maintenance of the ditch is not so incompatible.

Second, by lapse of time, the ditch having been open and carrying the water as now for more than twenty years.

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Third, by estoppel. It is said that the commissioners by grading up the road and permitting the flow in the ditch for twenty years, have barred appellant's right to drain upon Kinsella's land, and so left him no other mode or means of drainage but the ditch.

In their answer, the commissioners aver that they were not intending merely to fill up the ditch, but also to put a culvert across the road, so that the water from complainant's tile drain could flow in its natural course, and as it did before the road was graded up. The evidence is that they were putting in the culvert when the injunction writ was served, and it is conceded that by a proper culvert there, the water would flow in its natural course. Kinsella was made a party defendant, but did not answer, for the reason, it may be inferred, that as he testified, he did not object to that arrangement. Nor could he successfully resist its execution—if he were so disposed.

What more could appellant rightfully demand or reasonably want? Why should he insist on keeping open this wide and deep ditch, becoming deeper and wider, only to give him drainage in an unnatural course, when he could have it in the natural one as fully and completely and at a little cost to him by the means proposed? In the judgment of the commissioners it had become inconvenient and dangerous in the highway, which would seem to be sufficiently obvious from its location and description alone; and its maintenance was shown to be wrongful and injurious to Carmody. There was no apparent necessity for it or advantage in it. It was therefore clearly their duty, under the statute which gave them charge of the road and required them to keep it in repair, and to improve it so far as practicable, to fill it up, as the needful and only way to avert the danger and put an end to the wrong and injury.

We think the evidence shows the facts above stated, in which case it is hardly necessary to say that appellant could not have the right here claimed, as owner of the fee in the north half of the highway, by prescription, estoppel or otherwise. The decree was right and will be affirmed.

Marsh, Adm'r, etc., v. Prentiss et al.

1. *Action for Money Had and Received, etc.*—An action for money had and received under the common counts, can not be sustained without proof that the defendant received the money for the use of the plaintiff, and that a formal demand for the same was made before the commencement of the suit.

2. *Gifts Causa Mortis and Inter Vivos.*—There are two kinds of gifts: 1, gifts simply so called, or gifts *inter vivos*, as they were distinguished in the civil law; and 2, gifts *causa mortis*, or those made in apprehension of death. An instruction stating that if a person, when sick and not expecting to get well, give money to another, and afterward recover from his sickness and repossess himself of the money, defines a gift *causa mortis*.

3. *Gifts Inter Vivos.*—Where an aged wife took a package of money from a book-case and gave or delivered it to her husband, saying that she was getting in poor health and did not expect to live very long, that she wanted him to take it, and at her death bury her, pay the funeral expenses and the balance was his, it was held to be a gift *inter vivos*.

Memorandum.—Action of assumpsit. common counts. Appeal from the Circuit Court of McDonough County; the Hon. WILLIAM MARSH, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1891, and affirmed. Opinion filed December 2, 1892.

The opinion states the case.

APPELLANT'S BRIEF.

A gift *mortis causa* has been clearly defined by this court. *Barnet v. The People*, 25 Ill. App. 136; *Jayne v. Murphy*, 31 Ill. App. 28.

One of the indispensable requisites of a gift *mortis causa*, is, that the death of the donee must ensue without any perfect remission of the apprehended peril. The doctrine is elementary, that in case the donee recovers from the illness or survives the peril, the gift not only becomes void, but the donee may recover the subject-matter of the gift. *Grymes v. Home*, 49 N. Y. 21; *Wetson v. Hight*, 17 Me. 287; *Jones v. Selby*, Prec. Ch. 300; *Merchant v. Merchant*, 2 Bradf. (N. Y.) 432; *Bunn v. Markham*, 7 Taunt. 230.

"A party is not required to demand performance of him

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who has already expressly refused to perform his obligations, for *lex neminem cogit ad vana*.” Abels v. Gover, 15 La. Ann. 247.

“When the debtor notifies the creditor that he will not pay a debt due him, the law does not require the latter to go through the vain form of demanding the debt before bringing an action to recover it.” Taylor v. Hodges, 105 N. C. 304; 11 S. E. Rep. 136. “The legitimate object of a demand is to enable the party to perform his contract or discharge his liability, agreeably to the nature of it, without a suit at law, and whenever one party wholly denies the right of the other, a demand must be useless.” Heard v. Lodge, 20 Pick. (Mass.) 53. “The reason for giving notice and the necessity of it cease when from the facts of the case it is apparent that the party to be charged had no right to expect, and can not have been injured by want of it.” Randon v. Barton, 4 Tex. 289.

“In relation to notice, the rule is, that whenever the fact upon which the defendant’s liability is incurred lies peculiarly within the knowledge and privity of the plaintiff, notice thereof must be stated to have been given to the defendant. But where the matter lies as much within the cognizance of one party as the other, notice is not necessary.” Watson v. Walker, 23 N. H. 471. The principle announced in the above quotations is stated in the replevin cases of Bowman v. Bartlett et al., 29 Wis. 22, and Gottlieb v. Harman, 3 Colo. 53. A demand in the case at bar, would, in the language of the court in Lent v. Paddleford, 10 Mass. 230, have been a fruitless ceremony. The fact that plaintiff had, prior to bringing this suit, commenced citation proceedings for the same cause of action, would be both notice and demand if they were required in this case. Linn v. McClelland, 4 Dev. and B. (N. C.) 458; Nixon v. Long, 11 Ired. (N. C.) 428; Badger v. Batavia Mfg. Co., 70 Ill. 302.

AGNEW & VOSE, attorneys for appellant.

T. J. SPARKS, B. PONTIOUS and PRENTISS & BAILY, attorneys for appellees.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

Assumpsit, on common counts, against appellees. Trial by jury on the general issue, and verdict for defendants. New trial denied, and judgment entered on the verdict, from which plaintiff appealed.

Decedent was the mother of appellant, by her first husband. In 1860 she married Cornelius Ades, with whom she lived, first on the home farm of her deceased husband, for five years, then at Prairie City for about ten years, then in Iowa for five years, and then in Kansas until the summer or early in the fall of 1888, when they returned to the home farm, then owned and occupied by appellant, where she died on the 27th of October of that year.

It appears that for ten or more years before they returned from Kansas, Mrs. Ades had had the care of a sum of money amounting to about \$1,700, which had been kept in packages bound with paste-board. After their return Mr. Ades let appellant have \$200 before her death, and \$500 shortly after it. Appellant claimed that all of the money in these packages belonged exclusively to his mother until and at the time of her death. Mr. Ades claimed it belonged to him and her alike, being the aggregate of their joint and several earnings, and for their joint and common use, until some time in the year 1887, and that she then gave him all her interest in it and delivered the packages to him. On the 29th of January 1889, appellant took out letters of administration upon her estate, and caused a citation to be issued from the County Court to Mr. Ades, to account for and pay over and deliver to him, as administrator, this money and some other effects claimed to belong to the estate. At the hearing on the citation Mr. Ades produced a large pocket book containing what he said was the money that had been in the packages, less the amount he had let appellant have, and testified fully in relation to it. From the order made on that hearing both appellant and Mr. Ades appealed. The pocket book was opened and the money therein counted by the county judge. It amounted to \$935. Appellees, who were the attorneys

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for Mr. Ades, signed his appeal bond as sureties, in consideration of which and for their security the money was delivered to them by the judge, with the consent of all parties. Before the hearing on the appeal Mr. Ades died. The record shows that at the May term, 1890, to which it was taken, his death was suggested, Hiram Harris, who had been appointed his administrator, substituted as defendant, his appearance entered, and the cause tried by the court without a jury, by consent; and that at the close of the trial and after argument by counsel, the judge announced his finding and decision against the plaintiff and in favor of the defendant; but before it was entered on the docket or made of record one of the attorneys for the plaintiff asked leave for him to dismiss his suit and announced that he did dismiss it; to which the defendant by his attorneys objected and asked for a final judgment in his favor, but the court granted the leave and made the order dismissing the case at the cost of plaintiff, to be paid in due course of administration. And thereupon (immediately, as we understand,) the *præcipe* for the summons in this case was filed.

The suit was commenced, according to their testimony, without any previous formal demand upon defendants. It is said, however, that they knew plaintiff claimed the money and that one of them was told by his attorney that suit would be brought against them, and replied that it would be some time before he would get it, substantially; that they would not pay it to him until compelled by law; that this was a sufficient demand and refusal, or, that under these circumstances, demand was unnecessary. *

The declaration was upon the consolidated money counts; of which only that for money had and received to plaintiff's use can be claimed to be supported by the evidence. There can be no dispute as to how, of whom, and for what purpose they received it. They received it from Ades, who was in possession and claiming the ownership of it, upon their signing his appeal bond as sureties, to secure them against loss by reason thereof. When they had signed it the county judge had no legal possession or control over it, nor could

plaintiff, pending the appeal, lawfully interfere with Ades' disposition of it. When their liabilities as sureties were extinguished, without loss to them, by plaintiff's dismissal of the case, defendant's right to retain it as against Ades or his administrator, ceased. But were they bound to deliver it to plaintiff, even upon a formal demand? They knew he had claimed it and sought to obtain it by the citation proceeding, but they also knew he had dismissed that proceedings after trial had and verdict announced against him. Were they bound, notwithstanding this, to concede his right and deliver it to him, at their peril, as against the party from whom they received possession, then and still claiming to own it? A court of equity at their instance would doubtless have sustained a bill of interpleader, and required him first to establish his right on an issue with the adverse claimant. But was it incumbent on them to file such a bill? He knew they did not pretend to own the money and all the other facts it would be necessary to state in such a bill. He had commenced litigation for it against the adverse claimant, and being defeated in fact, sought a new trial in effect, by this action against appellees, and thus to impose upon them the burden of establishing his right in still another, at the suit of such claimant.

While this action is in form at law, it is upon a count "which in its spirit and objects has been likened to a bill in equity." 2 Greenl. on Ev., Sec. 117. We are inclined to the opinion that the evidence fails to support the count; that defendants did not originally receive this money for the use of appellant; that their equitable liability was not changed by the dismissal of the citation proceeding, nor would have been by the additional fact, had it been a fact, that a formal demand was thereupon made of them by him; that they did not stand, as to him, in the shoes of Ades; and that in equity and good conscience they would not be bound to deliver it to appellant, under the circumstances of their possession, without the consent of Ades or a judgment in favor of appellant against him.

But however that may be, it is manifest from the special

finding that the jury determined the question of right, as between appellant and Ades, against appellant.

Upon the question there was but little, if any, material evidence except the testimony of Ades himself on the hearing before the County Court. As to what he there stated, the evidence was not entirely harmonious. None of the witnesses who heard him pretended to give his language. According to those introduced by appellant, it was, in substance, that she gave or delivered the packages to him, saying that she was getting in poor health and did not expect to live very long; that she wanted him to take it and at her death bury her, pay the funeral expenses and the balance was his. About an equal number for defendants stated it to have been, that one day when they were together in the house, she went and took them from behind some books in the book case, where she had kept them, and brought and handed them to him or laid them on his lap, saying she was old and feeble, her health was failing and she couldn't expect to live very long; that she had been his treasurer for many years and couldn't keep it any longer; "take it and keep it; it is yours; there is enough to keep us while we both live; when I die you will pay the funeral expenses, and there will be plenty left to take care of you as long as you live."

In the argument for appellant it is said that according to the version of two of appellees' witnesses it was a bailment, and that the weight of the evidence showed it was coupled with conditions. Neither of these views, however, appears to have been suggested on the trial, and neither is intimated in any of the instructions asked. It seems to have been conceded that the evidence showed a gift, and the only question was whether it was *inter vivos* or *causa mortis*, and valid as such. Appellant contended it was *causa mortis*, and that the donor, after making it, recovered her health and repossessed herself of the money; appellees, that it was absolute and that the donee retained its possession.

There was evidence that a few moments after the delivery to him, he either replaced the packages in the book case or

handed them to her to be so replaced and she did it. If the latter, it could hardly be understood as intended to be a return of them into her possession and care, which she had just relinquished for the reasons stated. We find no word of evidence in the record tending to show that she ever afterward touched or saw them, or claimed possession or control of them, and he testified that they continued to be, without interruption, in his. Whether they remained in the same condition until her death, is an inquiry of no importance, though it is probable, from the amount produced on the hearing, that their passage from Kansas and some other expenses had been paid out of it, and also the \$200 to appellant. There was nothing shown from which it could be inferred that any change in its condition was made by her, or that she was ever again in such possession as was adverse to or exclusive of him, or as she had before the alleged relinquishment and gift to him. Therefore there was no error in disallowing the offer to prove what she said, after that, about the possession.

Mr. Prentiss having testified to the statement of Mr. Ades of the property he took to the farm when he married Mrs. Marsh, counsel for appellant offered, in rebuttal, to prove by Mr. Dorothy that at that time he had no property. This was offered for the purpose of overcoming any presumption or inference that the money in question was in any part the proceeds, direct or indirect, of any such property. But the court refused to admit it, saying: "No, that was twenty-eight years ago. It isn't of enough importance to take up any time."

Appellant had brought out the statement by George Tunnicliff, his first witness, that Mr. Ades said he took to the farm some horses and some live stock, but had at that time only about enough property to pay his debts. If it was material to show what property he then had, or to contradict this statement by showing that he had none, the proper time for it was before plaintiff closed his case in chief. But whether this would have been also proper in rebuttal or not, we think the court was right in holding the

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question too unimportant to be gone into. Appellee never pretended that there was any evidence tending to show how much of this money was previously his. He claimed it all, by virtue of the alleged gift, and unless it is so established we find no evidence upon which the jury could properly award him any definite proportion or part of it. The case was all in the question of such gift. That of previous joint ownership could throw no light upon it, since it is clear that Ades never used the term as indicating the several interests. To the special interrogatory, whether the money was originally their joint property, the jury answered that they did not know. We do not see that the exclusion of the evidence offered could have injured appellant.

Mr. Prentiss also testified to the statement by Ades that after the death of his wife appellant importuned him for the \$500 and wanted him to make a will bequeathing the money to him. It is said that this statement was introduced for the sole purpose of showing that appellant understood it was the money of Ades and that the court erred in refusing to allow appellant to contradict it or give his version of the matter.

Appellant had no personal knowledge of the facts. His understanding or opinion of Ades' right must have been derived from information, and would be no evidence of the fact. But besides, we think counsel is mistaken as to the action of the court. The statement of Ades, as related by Prentiss, was not of a conversation, but of certain facts; that Marsh began to importune him and wanted \$500 to use; that he told him he could let him have it and did so; that afterward Marsh suggested it was not safe to carry his money around that way; that he had better put it in the bank and make a will and will it to him; that he would like to have him do it.

The examination of Marsh in chief comprised only three questions: 1, whether he received from Ades \$500 after his mother's death, which he answered affirmatively; 2, what did Ades say to him, if anything, at the time (which the court excluded); Ades made no statement as to that; and 3, whether

he requested Ades to will his money to him, which he denied. On cross-examination he admitted that he had told Ades it was not safe to carry the money around in that way, and advised him to put it in the bank, and that in answer to a question by Ades whether he had better make such a will he had told him he had. Then on re-examination he was asked the single question, what other conversation had been had with Ades at that time, which the court excluded.

Thus it appears from the record, which we have examined on this point, that appellant was permitted, without objection, to answer the statement of fact made by Ades, and was only refused permission to state the conversation which Ades had not given. And his answers were not different from the statement of Ades, excepting the difference between advice and request to make the will, which is immaterial.

At the request of the plaintiff, the court gave the following instruction: "If Phoebe Ades, when sick, and not expecting to get well, gave the money in dispute in this case to her husband, and afterward recovered from said sickness and repossessed herself of said money, then such gift would be void;" and refused two others asked, of which one was simply a definition of a gift *causa mortis*, and the other declared it essential to the validity of such a gift that the donor shall die of the sickness or peril with which he or she is afflicted or threatened.

At the request of the defendants, two were given, of which one was that if the jury should find from the evidence that Mrs. Ades did own the money "and that she gave and delivered it to her husband before she died," then the plaintiff could not recover in this case; and the other added to the hypothesis of gift, as above stated, she "delivered the possession of it to him with the intention of then and there vesting in him the title and ownership of said money;" and the consequence was that the plaintiff could not recover without proof that Ades afterward gave it back and delivered it to her with a like intention.

The refusal of the plaintiff's two, referred to, and the giving

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of those asked for defendants are emphatically complained of. It is said that the latter not only ignore the plaintiff's theory of the case, but directly contradict the instruction given for him as above quoted.

We think the substance of plaintiff's refused instructions was contained in the one given, and in better practical form. The statement that such a gift as is therein described is called *donatio causa mortis*, could not aid the jury or the plaintiff.

Nor do we understand that those given for the defendants contradict the one given for plaintiff. They proceed upon a different and antagonistic hypothesis, and therefore must ignore the other; but there is no contradiction. *City of Chicago v. Schmidt*, 107 Ill. 191. That of plaintiff is a gift *causa mortis*, though it does not so name it. That of the defendants is a gift *inter vivos*, though they do not so name it. Chancellor Kent says: "There are two kinds of gifts: 1, gifts, *simply so called*, or gifts *inter vivos*, as they were distinguished in the civil law; 2, gifts *causa mortis*, or those made in the apprehension of death." 2 Kent's Comm., side p. 438. In defendants' instructions it is a gift, *simply so called*, which is a gift *inter vivos*. The distinction might have been more sharply and clearly drawn in each, and perhaps it would have been better, but as they stand there is no contradiction. We have already said that we find no evidence tending to show that Mrs. Ades ever repossessed herself of this money, as is assumed in the plaintiff's instruction, if that were necessary. Nor, we may now add, that she ever "recovered from said sickness," so as to avoid the gift therein mentioned. It does not indicate the particular form nor even the general character of her sickness, and it may be doubted whether her apprehension had a sufficiently definite reference to any particular cause, to make a gift in her condition a gift *causa mortis*. All that appears on that subject is that she was not well, and said her health was failing; she was growing old and feeble, and could not live, or expect to live, very long. This does not show a definite or special apprehension of death. But if it did, and what-

ever may have been the cause, the evidence is that she never entirely recovered. The testimony of Mrs. Lydia Ades, on cross-examination, is all that counsel refer to on this point. She was asked if, when they came back on the visit, in May, 1888, Mrs. Ades had not recovered her health. It does not appear that the witness knew just what it had been, so as to know whether she was or was not better, but she answered that she was able to sit up part of the time. Counsel then said interrogatively, "She was able to make the trip?" And the witness answered, "Well, in a sleeper." She further answered to leading questions, that she was able to ride around in a wagon, at times. She was then asked if she had not substantially recovered her health, and answered, yes, so as to be around most of the time. The impression clearly made by her testimony in the record is, that she was better at some times than at others, but never well or recovered. Sylvanus Ades testified that she never recovered—he thought she was never better than at the time of the gift, but rather grew gradually worse until she died. One of the indispensable requisites of a gift *causa mortis* is that the death of the donor must ensue without any perfect remission of the apprehended peril. *Barnet v. The People*, 25 App. 136, and authority there cited. In this case her death did so ensue. There was no perfect remission of the apprehended peril, whatever it was.

On either hypothesis as to the character of the gift, we think the evidence clearly warranted the finding, and the judgment will therefore be affirmed.

O'Bannon, Executrix, etc., v. Vigus.

1. *Determining Questions of Fact.*—In determining questions of fact and in passing upon the question as to whether a verdict is against the weight of the evidence, the Appellate Court will take into consideration all matters affecting the creditabilities of the witnesses, such as the apparent interest of the witness, his opportunities of knowing the matters

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about which he testifies, the reasonableness or unreasonableness of his testimony when tested by rules of common sense and judgment or when compared with other matters in evidence and undisputed so far as such matters appear of record, and will exercise a judicial discretion and judgment in determining the same.

2. *Receipt as Evidence.*—The rule of evidence as to the weight of a receipt and of the kind and amount of proof required to overcome it applies to receipts conceded or shown to be genuine and not to such as are shown to be false or forged.

3. *Receipts—Weight as Evidence.*—The fact that a receipt is forged or altered after its execution may be shown by a bare preponderance of the evidence.

4. *Verdict Unsupported by the Evidence.*—A verdict unsupported by the evidence, and against the great weight and body of it, will be set aside.

Memorandum.—Claim against the estate of a deceased person. Appeal from a judgment in favor of the claimant rendered by the Circuit Court of Montgomery County; the Hon. JAMES A. CREIGHTON, Circuit Judge, presiding. Heard at the May term of this court, A. D. 1891, and reversed. Opinion filed December 2, 1892.

APPELLANT'S STATEMENT OF THE CASE.

Eliza Vigus, the mother of appellee, on the 23d day of May, 1872, took out a policy in the Protection Life Insurance Company, of Chicago, for \$5,000, payable to appellee. She died on the 12th of October, 1874. Proofs of loss were duly made to the company. At the request of appellee, R. W. O'Bannon, the deceased, went to Chicago early in January, 1875, to collect the amount of the policy. In two or three days he returned, and brought with him a note and check for \$1,000 each, dated January 5, 1875. They were accepted by appellee, and on the same date he gave a receipt to the company in full payment of the policy.

O'Bannon died on the 13th of November, 1883. Appellant was appointed his executrix, and on the 19th of June, 1884, appellee filed his claim against the estate, as follows:

“Estate of R. W. O'Bannon, deceased,

“To Darius L. Vigus, Dr.

“To the sum of \$3,000, collected and received by said O'Bannon, to the use of said Vigus, of the Protection Life Insurance Company, of Chicago, on policy No. 4266, on the life of Eliza Vigus, now deceased, on, to wit, the 4th day of March, A. D. 1875, with interest thereon at

the rate of six per cent. per annum. Said money having been collected by said O'Bannon while acting as claimant's agent; the collection of which sum was by said O'Bannon fraudulently concealed from the claimant during the lifetime of said O'Bannon."

The policy was for \$5,000. Two thousand dollars were collected by O'Bannon and paid to Vigus. As to this there is no dispute. The contention is as to the \$3,000.

The evidence offered to show the liability of the estate was the following receipt on the back of the policy:

"Received of the Protection Life Insurance Company five thousand dollars, being amount in full of the within policy.

"(Signed)

D. L. VIGUS.

By R. W. O'BANNON."

This receipt was without date. It was written by Terpenney, the book-keeper of the company, except the words, "five thousand," and the signature. He said: "O'Bannon was in the office of the company when he wrote the receipt."

It is claimed that the receipt was false, the words five thousand dollars having been filled in after it was signed by O'Bannon.

ANTHONY THORNTON, LANE & COOPER, and R. McWILLIAMS,
attorneys for appellant.

APPELLEE'S BRIEF.

Upon a second appeal, the decision of the court on the former appeal is conclusive of the questions then involved. *Greene v. City of Springfield*, 130 Ill. 513; *Hook v. Riche-son*, 115 Ill. 431-443; *The Washburn & Moen Mfg. Co. v. The Chicago Galvanized Wire Fence Co.*, 119 Ill. 30-42; *Smith v. Neff*, 123 Ill. 310-13; *Mix v. The People*, 122 Ill. 641; *Reed v. West*, 70 Ill. 479; *Ogden v. Larrabee*, 70 Ill. 510; *Rising v. Carr*, 70 Ill. 596; *Smith v. Brittenham*, 94 Ill. 624; *Moshier v. Norton*, 100 Ill. 63; *Newberry v. Blatchford*, 106 Ill. 584; *Johnson v. Kettler*, 84 Ill. 315; *Walker v. Doane*, 108 Ill. 236; *The Village of Desplaines v. Poyer*, 22 Ill. App. 574, and cases cited; *Keiser v. Cox* (Third District), 16 Ill. App. 631; *The Chicago, Milwaukee & St. Paul Railway Co. v. Snyder*, 27 Ill. App. 476.

A man may perpetrate a fraud by knowingly telling a

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falsehood, or by recklessly affirming that to be of his own knowledge which he does not know to be true. *Case v. Ayers*, 65 Ill. 142; *Allen v. Hart*, 72 Ill. 104; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Reps. 727; *Bigelow on Fraud*, 61-3; *Kerr on Fraud & Mistake*, 54; *Bennett v. Judson*, 21 N. Y. 238; *Cabot v. Christie*, 42 Vt. 121; *Lobdell v. Baker*, 1 Met. Mass. 194, top of page 201; *Monroe v. Pritchett*, 16 Ala. 785; 1 Smith L'd'g Cas., Pt. 1, 301, 302.

Vigus appointed O'Bannon his agent to go to Chicago, and gave him full and unlimited power to settle the claim. "Agents also occupy a relation of trust, with peculiar opportunities for fraud upon their principals; and the rules of law, in respect of transactions between them concerning the interest in trust, are in some particulars more unfavorable to the agent than the rules relating to attorney and client are to the attorney," says *Bigelow* in his work on *Fraud*, 222.

"Loyalty to his trust is the first duty which the agent owes to his principal. Without it the perfect relation can not exist. Reliance upon the agent's integrity, fidelity and capacity is the moving consideration in the creation of all agencies." *Mechem on Agency*, Sec. 454.

O'Bannon "assumed voluntarily, a confidential relation," and appellant "can not be allowed to enjoy a personal advantage by saying that O'Bannon was not entitled to the confidence Vigus placed in him." *Gruhn v. Richardson*, 128 Ill. 178-186; *Pomeroy v. Benton*, 57 Mo. 531; *Cottrill v. Krum*, 100 Mo. 549; *C. & N. W. Ry. Co. v. Goebel*, 119 Ill. 515-524.

O'Bannon is clearly shown to be the wrongdoer; then, as between him and Vigus, the presumptions respecting disputed facts are with the latter. *Costigan v. Mohawk, etc., R. R. Co.*, 2 Den. (N. Y.) 609; *Time v. Wharf Co.*, 7 Cal. 253; *Loomis v. Green*, 7 M. E. 386; *Pierce v. Millay*, 62 Ill. 133; *Millard v. Swanson*, 22 Ill. App. 424; *Wear v. Duke, et al.*, 23 Ill. App. 322; *C., I. & W. Co. v. Badger*, 30 Ill. App. 314; *McMahon v. Sankey*, 35 Ill. App. 341; *C., B. & Q. R. R. Co. v. Merckes*, 36 Ill. App. 195.

GEORGE L. ZINK and J. M. TRUITT, attorneys for appellee.

OPINION OF THE COURT.

On the night of Sunday, January 5, 1873, R. W. O'Bannon went from Raymond, in Montgomery County, to Chicago, as the agent of appellee, to collect what he could on a policy of the Protection Life Ins. Co. for \$5,000 upon his mother's life for his benefit. On the night of Tuesday, the 5th, he returned, reported to him a compromise and settlement, subject to his approval, with A. W. Edwards, secretary and manager of the company, for \$2,000, as the best he was able to make, and advised him to accept it. At the same time he tendered the company's check of January 5, for \$1,000, and its note, at sixty days, of the same date, for a like sum, both payable to his order. After hesitation and discussion, appellee accepted them, and signed a receipt of the same date, which had been prepared by Edwards, in full of the policy, but without stating the amount; which was returned to the company on Friday, the 8th. Appellee never received anything more on the policy, but the further sum of \$3,000 was afterward assessed and collected by the company on account of this loss, and paid to somebody on its check of March 4th, made payable to his order. This check was drawn by Mr. Terpenney, the book-keeper, by direction of Edwards, and delivered to him; was paid some time in June, and on its return by the bank was placed by Terpenney with the other papers in the case in the company's vault, to which Edwards had access. No further trace of it appears. In 1877 the company failed. Edwards removed to Dakota in 1879. His deposition was taken, and he strangely denied all recollection of the check settlement or claim. Terpenney, who continued in the service of the receiver or assignee after the failure, looked for it carefully, and found all the other papers relating to the case together in their proper place, but this check was gone and has never been traced. The check for \$1,000 given to Vigus and the check given the bank cashier to pay the note were signed by Hillard, as president, and Edwards as secretary,

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according to the custom. The one for \$3,000 was signed by Edwards, as secretary, but by whom else or how it was indorsed Terpenney did not recollect, nor was it otherwise shown.

In his search for it in July, 1883, he found among the papers the policy in question, with a receipt indorsed thereon, purporting to be for "five thousand dollars, being amount in full of the within policy," without date, and all in his own handwriting except the words "five thousand," which were in that of Edwards, and the signature, which was "D. Vigus, by R. W. O'Bannon," and in the handwriting of the latter. In October following he casually informed appellee of this receipt, and thereupon an action on the case was instituted against Edwards.

O'Bannon was then on his death bed, and died on the 15th of the next month. Appellee afterward dismissed his suit against Edwards, and on the 30th of June, 1884, filed this claim in the County Court against the estate of O'Bannon for the amount of the missing check and interest from its date—alleging that O'Bannon had collected it as his agent and fraudulently concealed the fact.

There the claim was disallowed. The case has been three times tried in the Circuit Court and brought here on appeal from its judgments. The first was for the defendant, which we affirmed on the merits (19 App. 241), but the Supreme Court reversed it and ours. (118 Ill. 334.) On the second trial some changes of more or less importance were made by some of the witnesses in their statements on the first, and some new evidence introduced on each side; and the judgment was for plaintiff. We thought these changes and additions weakened his case and positively strengthened the defense. His rested, as before, on O'Bannon's receipt as it then appeared on the policy, his alleged admission to Miller in the spring of 1875, and statement made on his return from Chicago about the cancer letters.

We discredited all this evidence; the receipt, because the words "five thousand" were inserted without his authority where it was blank when he signed it; and the admission

and statements, because the testimony tending to prove them was unreliable and improbable in itself, inconsistent with better attested facts, supported only by assumptions which were themselves unsupported and more rationally explained by the supposition that they were misunderstood. Thus, if the admission to Miller, as stated by him, was embodied in a request that was in the highest degree insulting to a man of honor and yet was not resented nor disclosed until O'Bannon was dead and this claim had been disallowed by the County Court, was not true in fact, and would expose his own estate to loss and his reputation to ruin, reason and charity would force the belief that it was not so intended by O'Bannon, and never so understood by Miller until he heard of the surprising receipt on the policy, but always before as having been in substance the same that had been made to Vigus and others before and about that time, namely, that he had settled the claim of Vigus upon a five thousand dollar policy, and not that he had collected \$5,000 upon the policy.

So also, of the alleged statement about the cancer letters or letter; if it was improbable on its face, untrue in fact, needless or rather hurtful and hindering to the purpose supposed to be in view, likely to lead to injury, easy to be disproved, with consequences certainly ruinous to himself and disgraceful to his family, every fair mind would naturally look for some explanation which should make it more probable that the witnesses were mistaken than that he made or intended to make such a statement. All of this was true and proved of the statement alleged, and an explanation was suggested, which has not been shown nor attempted to be shown to be inadmissible.

On the other hand, the clear weight of the evidence seemed to show that on January 5, 1875, O'Bannon in good faith finally settled the claim in question for the check and note of \$1,000 each, that he delivered to appellee, and no more, subject to his ratification. For it established the following facts: Proof of death of the insured was submitted to the company November 28, 1874. By the terms of the policy

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it had ninety days from that date within which to pay the loss. Appellee wanted money, for a special purpose, as soon as he could get it. He began at once to importune the company for it. Edwards paid no attention to his letters. For some reason he soon came to expect he would have to submit to a compromise, if he got anything. His mother had been treated for cancer existing before the policy, which had lapsed, was reinstated, though it does not appear that O'Bannon knew or had any intimation of it before he went to Chicago on this business. He went on short notice, in place of his son who had been first engaged, because of his long and friendly acquaintance with Edwards. He went expecting to compromise, and authorized to do so on the best terms he could get. At what time on the morning of the 4th he arrived at Chicago, or how soon afterward he saw Edwards was not shown. Doubtless he saw him on that day, but not at his office. They discussed the claim, probably at considerable length. Edwards told him the company had information that when the policy was reinstated Mrs. Vigus was not a fit subject for insurance, and particularly, at least, that she had been injured by a fall on the street at Litchfield for which she had recovered damages against the city. It did not appear that in that interview anything was said about cancer, unless from statements of O'Bannon on his return. Finally, however, Edwards made him as low an offer as \$2,000, and no more. O'Bannon hesitated to accept it, and they separated without a settlement on that day. Up to this time, surely, it can not be pretended that their action was not natural, business-like, in good faith and at arm's length. On the next day O'Bannon appeared at the office of Edwards, which was occupied by Terpenney also, whose desk was only about ten feet from that of the secretary, and while there Terpenney, by direction of Edwards, drew or filled up and delivered to him the note and check for \$1,000 each and the receipt on the policy with a blank space for the amount, and Edwards prepared the receipt in full for appellee to sign if he would. Whether the note and check were printed and already or ever afterward signed by

the president or vice-president, does not appear; but they were duly paid. The policy was left with Edwards, and O'Bannon, with the note, check and receipt to be signed by appellee, took the evening train for Raymond. Terpenny made an entry on the books of the company, of the same date, showing that the note was given for the "balance due," all that remained to be paid on the policy. There was no evidence tending to prove that O'Bannon ever afterward had any communication with any agent of the insurance company or of the bank, or knew of the filling of the blank in his receipt or of the existence of the \$3,000 check, except his alleged admission to Miller, and the fact, if it was a fact, of which there was some evidence, that he went again to Chicago at some time in the following spring, which in our judgment was fairly overcome by the two receipts in full, the book entry and the other facts stated.

If a final settlement could be proved by circumstances, these, not otherwise explained, would prove it. All of them having so appeared on the first trial, we found it was then and thus made; and that fact alone, if such was the fact, would of itself effectually dispose of the alleged admission, and make wholly immaterial in this action whatever lies O'Bannon might have told to justify his settlement or induce its ratification.

Feeling the force of these circumstances, appellee introduced as a new witness on the second trial Martin Ryan, the actuary of the company, who testified, that about the first of January, 1875, Edwards, at his office, introduced him to O'Bannon; that they proceeded to talk about this claim; that O'Bannon urged its "settlement," and Edwards "seemed disposed to favor him, but said it had not been assessed for yet. O'Bannon desired some money immediately, on that occasion. Edwards agreed to give \$1,000 down or a check for \$1,000, and a draft or note at sixty days—I think it was for another \$1,000—and the balance when the claim was assessed for and collected;" that Edwards then handed to witness the proofs of loss and told him to see that it got into the next assessment (without stating the amount), to be sent

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out early in February, and then directed the book-keeper to draw up the check and note for \$1,000 each, which the book-keeper apparently proceeded to do.

The case of plaintiff and the reputation of Edward were in urgent need of some such evidence as this statement that he then agreed to pay on this policy \$3,000, in addition to the note and check then given, when the claim was assessed for and collected; but it could not be made to fit the facts. It was conceded upon the uncontradicted testimony of Charles A. Walker, the attorney of the company, who was also a new witness on the part of the defense, that no longer than the day before, after some discussion in his office, which was in the same building, and just over that of Edwards, O'Bannon and Edwards, in his presence, absolutely agreed on a compromise and settlement of the claim for \$2,000, which Edwards had first offered; that O'Bannon seemed well pleased with that agreement, having been satisfied by Walker that the claim would be resisted if pushed, and that \$2,000 paid would probably be better for appellee than a judgment for the full amount; and that upon coming to the agreement O'Bannon and Edwards went down stairs together. We believed then, and think we can now show more clearly, that the meeting spoken of by Ryan took place immediately upon the agreement to compromise spoken of by Walker; that they went directly from his office to that of Edwards, and that the conversation between them there had no reference whatever to the amount, because that had just been agreed on, but solely to the time and manner of its payment, which had not been settled upstairs. Even according to Ryan, O'Bannon wanted some money immediately, and the disposition of Edwards to favor him was shown by his consent to give \$1,000 in cash, and a note, on which money could be immediately raised, for the residue. But upon the contention of counsel as to the time of the agreement on the amount, we said in the former opinion:

“We are asked to believe that this secretary, who, notwithstanding his friendship for O'Bannon, on Monday, for the substantial reasons stated, in the presence and with the

concurrence of the company's attorney, committed himself to a peremptory refusal to pay more than \$2,000, and actually got an agreement to settle for that amount, with which O'Bannon seemed well pleased, on Tuesday, without any new light on the subject, and without the knowledge of the attorney, was entertaining a proposition from O'Bannon to settle, and was so 'disposed to favor him' that he would have paid the full amount right down except that it had not been assessed and collected, and actually paid \$1,000 down, gave the company's note at sixty days for another thousand, and a *verbal* promise to pay \$3,000 more, to which all claim had been abandoned, as soon as it should be assessed and collected, and gave directions to have it assessed and collected as soon as possible. Considering, further, that nothing was yet due, that the financial condition of the company was not such as to justify any needless liberality in the settlement of claims against it, and that the book-keeper at the adjoining desk, who was probably within hearing of the whole arrangement, when he did 'proceed to draw up the papers,' proceeded further to enter the transaction on his books as a settlement for \$2,000 and no more, the statement that the secretary then agreed to pay the further large sum of \$3,000 seems but little less than monstrous."

This agreement to settle for \$2,000, proved by the circumstances and by the direct testimony of Walker, and now conceded, was made in good faith; for if the parties had then conspired to get from the company \$5,000, it is morally certain that they would not have made Walker a witness to their agreement on \$2,000. And unless that agreement was abandoned and a new one made before the note and check were delivered, then it was also executed in good faith. The evidence proved to our satisfaction that there was no such change in the agreement. To the reasons suggested in the above quotation, no answer has been attempted. The papers executed were in accordance with the agreement. There was no time after it was made and before the delivery of the papers, sufficient for the concoction of such a conspiracy as is charged, or any material

change in the terms of settlement so agreed on, nor any afterward, and before O'Bannon returned to Raymond; for, upon receipt of the papers, he left the office, and there is no evidence or reason for the belief that in the meantime he had any meeting or communication with Edwards; and if he did, it would seem to be the height of assumption and presumption to suppose that he would have broached or Edwards dared to suggest to him the idea of such a conspiracy. Nothing in his conduct or reputation or relations to Edwards or to appellee appears to warrant, but everything to forbid it. His life for nearly nine years afterward, at Raymond and Litchfield, was a continuous and emphatic denial of it.

The fact of a *bona fide*, executed settlement for \$2,000 being thus established, it follows that he could not have intended to admit to Miller or anybody, at any time, that he collected or received \$5,000; and that the question of false representation as to the cancer letter—if any such was made, which we do not believe—is immaterial.

For the reasons thus indicated and others, more fully set forth in the opinion filed (32 App. 483-7), this second judgment was reversed and the cause remanded. Having seen no reason to retract or modify the expression of our views of the law or the evidence as to any material point presented by the record then before us, we might here have simply referred to it, for those we still entertain, so far as applicable. But out of respect to counsel and their elaborate argument, if not also in justice to ourselves, we have repeated them, condensed and somewhat rearranged in their order, as a better introduction to what is now to be said on the bearing of the new evidence.

The points now urged as against the conclusion of the court on the former record are, (1) that there is not nor ever was, any evidence that the receipt on the policy was drawn or signed on January 5, 1875; (2) that the agreement in Walker's office to settle for \$2,000, was made on the morning of the 4th, and a new one for \$5,000 on the 5th, when the note and check were given; and (3) that the new testi-

mony of Mr. and Mrs. Hill fully proved O'Bannon's admission that he collected \$5,000. It is said the legal presumption is, that he signed the receipt as it now appears, and the inevitable conclusion from that fact and the testimony respecting his admission, is that he did collect that sum.

It is true of the receipt that Terpenney did not and would not give the date of its preparation, doubtless for the reason, and only for the reason, that it bore none on its face; for the occasion fixed the time just as certainly, and he had testified before, and not less than five times on the last trial, that he wrote it while O'Bannon was in the office, and further, that he never saw him there but the one time. To this there was no contradiction, and, in connection with other facts, it is conclusive.

We are content to submit our finding that O'Bannon signed it on that occasion, upon the reasons given in the former opinion (32 App. pp. 483-7), which remain unanswered. The new evidence for appellee presents nothing in opposition to them. Having then received the check and note, then was the proper time to receipt for them. There was every reason why he should and none why he should not. Edwards was an experienced business man, acting for the company. Such men do not make such payments without taking receipts. It was especially proper in this case, because O'Bannon was but an agent and his principal might not ratify the arrangement. His right to refuse was expressly reserved. No other receipt than the one so indorsed is claimed to have been given by him at any time.

We think it has already been sufficiently shown why the statement of Ryan on the second trial, that Edwards agreed to pay the further sum of \$3,000 when assessed and collected, ought not to have been believed; but his statement on the last, and the new evidence for appellant, call for some further observations in regard to it.

On the second trial the testimony of Walker preceded his. He now says he thinks he did not read it before he testified, but that he had some conversation with appellee and Mr. Truitt, his attorney, and they told him, in a general way,

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about it. Walker had said he had been under the "impression" that the meeting in his office, when the agreement to settle for \$2,000 was made, was on a *Monday* morning, in the latter part of December, 1874, or first part of January, 1875. A good many years had since passed. He said: "Of course it is simply an impression that has got on my mind. I don't know why I have got the impression." It appearing that the 4th of January, 1875, was a Monday, and that the note and check and receipt for Vigus to sign, and the entry on the book that the note was given for the "balance due on policy 4266," were all under date of January 5th, and that O'Bannon had said he made the settlement on the second day he was in Chicago, it was seen that appellee's claim was to be upheld only by the slender thread of Walker's unaccountable "impressions," upon the basis of some proof that when the settlement was actually made, there was an equally unaccountable *verbal* agreement to pay \$3,000, supplementing two written obligations for \$1,000 each. And Ryan, whose devotion to Edwards was shown, furnished the proof of such a sudden, great and unaccountable change in the agreement.

For the reasons indicated in the quotation above made, we thought and said it was more probable that Walker's impression as to the day was wrong than that any such change was made. But Ryan, since he furnished that proof, has read the preceding testimony of Walker. At first he denied it, but being confronted with his own letter to Walker stating that he had, he admitted it. Whether he had also read the opinion of this court does not appear. But for some reason, his clear and positive statement turns out on this trial to be also at best only an "impression," quite as vague and shallow as that of Walker. He says: "The settlement of the Vigus claim was talked between Edwards and O'Bannon. I did not pay special attention to the details. * * * My best recollection is, it was agreed to pay \$1,000 cash, and note payable about the time the money would come in. * * * He stated, I think, it was a great favor they were extending O'Bannon in making

advance payment, as the company was entitled to the date fixed. * * * Nothing was said about the result of the money due on the policy, in my presence. As I stated, I am not very clear as to what was said about the balance being paid when the claim was assessed and collected. My best recollection is, he was impressing on him that he was doing a favor; that the balance would be paid inside of ninety days, after the assessment. My best recollection is, this was stated—be paid when the assessment was collected.” On cross-examination he says: “Edwards ordered a check for \$1,000 and a note for \$1,000 on the Vigus claim, to be drawn up. I am not positive as to what was said about a balance. Have only a vague impression. Would not swear anything in relation to it, so void is my mind as to what was said.” We regard this as a substantial recantation—an admission that according to the statement of Edwards on that occasion the settlement was for a check (cash) and note at sixty days each for \$1,000; that the favor shown was by the payment in advance of the time mentioned in the policy; that the balance to be paid when assessed and collected, if anything of the kind was said, was the balance for which the note was given, as entered on the books, and not the further sum of \$3,000, of which nothing was said in his presence. The whole of the “talk” was confined to the time of payment of the amount agreed on—O'Bannon wanting cash, and Edwards insisting on the time for a part. Thus the testimony of Ryan is additional evidence of an actual settlement for \$2,000, and that it was made in good faith.

The other contention of counsel is also shown to be groundless. Walker's impression as to the time of the meeting and agreement in his office, was wrong; it took place on Tuesday, January 5th, and immediately preceding the execution of the papers, in the office of Edwards, as is more fully proved by the new evidence.

Walker testified before, and now also, that the meeting was in the *morning*. Counsel's position was that it was *Monday* morning, and that the parties had all the afternoon

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and evening after the agreement, in which to conspire, before the papers were executed. We thought it was Tuesday, because they would naturally proceed to execute the agreement immediately, since it would require only a few minutes' work, and the office of the secretary and book-keeper was just "down stairs," whither they went together; and further, because of the improbability that the preceding meetings and discussions and the intervals of time between them, together with the meeting in Walker's office, could have all occurred on the same morning, as they must if the latter, which was the last, was on Monday. First, O'Bannon, after a night ride in the cars, met Edwards—where or at what time was not shown—and they had a talk, doubtless somewhat lengthy, as it involved the justice of the claim and the question of a compromise; afterward, how long is not shown, Edwards saw Walker, told him O'Bannon was in town about the Vigus claim, that he had talked with him about a compromise, offered him \$2,000, which O'Bannon had not accepted, and that he probably would if advised by Walker to do so; and then, after another interval, how long did not appear, Walker says O'Bannon took him up to his office, went over the case and advised him to accept the offer made. All this took place before Edwards was called up and the agreement made. We still think it highly improbable that all of this took place on one morning. The question, however, is only as to the last, when the three parties were together and the agreement was made.

We regard the point of the time when it was made, within the period from O'Bannon's arrival in Chicago to his receipt of the note and check, as of no importance whatever to the defense of appellant, because, in our judgment, the idea of such a change in the agreement as is claimed, within any time that can be pretended for it, is on its face not to be entertained. Why, Ryan himself says that in the very conversation between them when the papers were drawn up, Edwards told O'Bannon that "there was a dispute about the claim, and an investigation, owing to letters from his

locality in regard to Mrs. Vigus' condition," though he could not say what was said, particularly, as to their contents. And yet it is seriously claimed that he promised to pay \$3,000 more than had so recently been agreed on; Ryan added that when Edwards told him about the letters O'Bannon, in substance, stated that "some enemies or unfriendly parties had been interfering with other people's business," which may help to explain the cancer testimony, and to show that the parties were still dealing at arm's length and O'Bannon was still faithful.

Counsel for appellee seem to see that unless by way of this idea of a change in the agreement, his every approach to a recovery from this estate is solidly excluded by the evidence; and therefore, whether a sufficient reason can or can not, at least a sufficient time and opportunity to make it, must be shown. Though proof of these might not materially aid his case, the want of it would be fatal. Important as it is to him, the whole argument for the time claimed is as follows:

"On Sunday night, January 3, 1875, O'Bannon started to Chicago, where he arrived the next morning * * * and it seems called *at once* on Edwards. After seeing Edwards, O'Bannon seems to have left the place of meeting, for when Edwards saw Walker *that morning*, so Walker says, the former told the latter that O'Bannon had come to Chicago on the Vigus matter, and that he, Edwards, had offered \$2,000 to settle the claim, and that he thought O'Bannon would accept it if Walker saw him and talked to him. We call particular attention to what Walker says. In response to the question, what Edwards said, he answered: 'Said Dick O'Bannon was in town.' For what purpose did he say he was in town? 'Said to me, Uncle Dick Bannon is in town; was up to see about the Vigus matter, etc.' This language clearly shows that O'Bannon's coming *must* have been of very recent occurrence; that he had *just* had his first interview with Edwards; that it *must* have been the first morning he was there; otherwise his old friend Walker *would* have sooner heard of it. Now, as O'Bannon left Ray-

mond Sunday night, and would naturally arrive in Chicago the following morning, *the conclusion must irresistibly be that it was on Monday morning, January 4, 1875, that O'Bannon was in Walker's office.* Walker then says that he watched for O'Bannon at the foot of the stairs, from which they went to Walker's office."

We find in the evidence no warrant for such positive use of any of the terms we have italicized; nothing to show with any definiteness at what time of the day or even on which of the two days O'Bannon first saw Edwards, how long he remained with him, how soon after they separated Edwards saw Walker, or how long he remained with him. All of these are matters of mere conjecture, or at most of very uncertain probability. It may have been as counsel assert, but it may not. For all the purposes of this case these assumptions may be conceded. We call attention to them only to show the looseness of the argument. But it would still be very easy to resist the conclusion last stated from the given premises or any other reasonably supported by the evidence, even as it appeared on the former trial. Now, consider the testimony of Walker on the last one. After stating the offer of \$2,000, and its acceptance, he proceeds: "They then went down stairs together. I saw Edwards at twelve o'clock, as I went to lunch. I went into his office and said, "You and Uncle Dick settled the matter," and he said "Yes." I saw Uncle Dick that afternoon and said to him, "You are lucky; you and Edwards have settled the matter;" and he said, "Yes, have settled."

The conclusion from this language that it was *not* on Monday morning, January 4, 1875, that O'Bannon was in Walker's office, is so natural, reasonable and plain that we draw it without hesitation. The twelve o'clock mentioned was the twelve o'clock of the same day they were in that office; they *settled* before that hour; and the settlement was made, as the papers show, on Tuesday, January 5, 1875. It was immediately on going down stairs together that they arranged the mode of payment and executed these papers. This was manifestly done in good faith. There was no

time or reason for the asserted change in the agreement and none whatever was made. Further, when Edwards was seen at twelve o'clock, O'Bannon was not with him, and when O'Bannon was seen in the afternoon, Edwards was not with him; and, as before said, there is not a particle of evidence tending to show that they were again together at any time before O'Bannon returned that night to Raymond. His report to appellee the next day that he had settled the claim for \$2,000, and could get no more, was therefore substantially and literally true.

That he had then conspired with Edwards to get more, or had a thought of getting it in any way, is a proposition without the least support in the evidence, so far as we can see. It does not appear that Edwards himself had any such design until just before the \$1,000 check was drawn. The new proof shows that in December he wrote to Walker, the company's attorney, that this claim should be compromised. On the former trial, as on this, it was shown that the assessment for this claim, as presented to and approved by the executive board, was for \$2,500 (as it would be according to the custom, as proved, if it was compromised at \$2,000), and it was so stated in the notices to members sent out in February, though the amount required to be paid by each would raise \$5,000. Ryan said the \$2,500 got in by mistake or misprint, which may now be doubted. But however that may be, Walker testified on this trial that early in February Edwards and Ryan came into his office with these notices and asked his opinion as to the propriety of sending them out.

He told them that this claim was compromised at \$2,000 and assessed for at \$2,500; that these notices were wrong and ought not to be sent out, to which Edwards replied that "there was no time to reprint them now, and if anybody kicked he would send the money back;" that he represented \$25,000 of the company's stock, and that in consequence of this statement of Edwards he then determined to get out; and that though he made no further complaint about the matter, he did leave the company in the following May or June. Counsel indulge in an insinuation

against Walker because he did not call attention to this over assessment which we think gratuitous, since, according to his understanding and the statement, it was simply a premature collection and the excess would still inure to the benefit of the members, according to the regular course of business, as shown, because it would be turned to the contingent assessment account. Walker therefore discharged his duty when he advised as strongly as he did against the sending out of those notices. The point we are making, however, is that Edwards was then fully aware that Walker knew the claim had been settled for \$2,000. It had been so declared and admitted in the presence of Ryan. (It is true that Ryan testified he had been instructed by Edwards to make the assessment for \$5,000, and did so; that he had no recollection of the conversation related by Edwards; and at first positively denied that he was ever in his office while he was connected with the company, but on having his attention called more particularly to it admitted his mistake.) It is hard to believe that Edwards, in the face of this knowledge of Walker, then intended to rob the company of this excess of \$3,000. Yet it may be that a month later--Walker in the meantime making no further complaint about the assessment notices and preparing to leave the company—he may have formed that purpose.

The excess would be collected early in March. A check for it could then be drawn to balance the books and look regular, but need not be paid until Walker was out. Ryan was his friend, whose conduct in this connection is questionable. Edwards had the receipt of Vigus in full and could fill up the blank in that of O'Bannon with "five thousand." These would satisfy the company that he had paid to the beneficiary the full amount of the policy and explain the mistake in the representation of the assessment as for \$2,500. He could easily find somebody who, for a consideration, would imitate the signature of Vigus, in his possession, and if he recognized the indorsement the bank would not question it, and he could abstract the check when returned.

For such reasons as these he may have concluded to take the risk. We do not say this is the true explanation of the facts proved, but we see no other. Counsel for appellee are compelled to charge, and do charge, Edwards with complicity. We, too, are fully satisfied that if O'Bannon is guilty, he also must be; for O'Bannon, without his aid, could not have obtained the check. But it is clear that after Edwards got the receipts of O'Bannon and Vigus, he had no need of O'Bannon's aid; and we fully believe, as we have endeavored to show from the evidence, that O'Bannon gave his and procured that of Vigus without a thought of wrong.

Of the testimony of Mr. and Mrs. Hill but little need be said. We regard it as wholly unreliable, in itself, and abundantly contradicted by the facts and probabilities of the case. They do not themselves agree. They were not witnesses of a kind to be relied on as to the precise language used in a casual conversation fifteen years before and never thought of in the meantime—not for lack of honesty, but of intelligence, discrimination and nice observation. They first talked it over with a zealous attorney for appellee, to whom we impute no improper purpose or method, but every experienced lawyer knows the tendency. Mr. Hill was a farm tenant; he testified that in April or May, 1875, he and his wife were in the store of O'Bannon (J. D.) & Vigus, where they generally did their trading; that she then had an interest in a policy of this company on her father's life; that crops were poor, it was hard to keep up payments, and they had talked of letting it lapse; that as he came into the store after her, R. W. O'Bannon said to him that his wife had been telling him this, and advised them not to do so; that he said it was a good, reliable company, and that he had just *collected* \$5,000 on this Vigus policy. On further examination he testified that O'Bannon might have said he *settled* the Vigus policy for \$5,000, though he thought it was the other way; then, that he said, "I *received* \$5,000 on the policy;" then, again, that the word was *collected*, of which he was pretty certain; then, that he could not give the

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identical language, and finally, "my best recollection is that he said *settled*." It appears that from O'Bannon's language, whatever it was, this witness got the impression that he had received the insurance, as he easily might from the statement that he had "settled" the claim on a \$5,000 policy, and therefore, naturally enough, he so testified at first; but he made it just as clear afterward that he couldn't pretend to be confident as to the language. His testimony on the whole shows it more probable that O'Bannon said he had settled a \$5,000 policy, or a claim on such a policy, than that he said he had collected or received \$5,000 on it. Mrs. Hill, who was excluded during his examination, with a like impression received in the same way, testified that the conversation occurred in May, 1875, which she thought was only eight years ago, and that O'Bannon said he collected the full amount, \$5,000, and that she could give his exact words. She stood immovably by her first statement. Giving her full credit for honesty, it may yet be observed that a woman, as ignorant as she, and unused to courts, might naturally be inclined to resent a cross-examination, however proper, and show herself quite unreasonably persistent and positive. And conceding that the jury, with better means than ours, discovered in her manner no sign of such a weakness, we still think her statement unreliable in its nature and untrue in fact. There was plenty of room for a misunderstanding, and of time for a failure of memory. Her husband's "best recollection" of it is different. It is refuted by the accumulated evidence of an actual and honest settlement for \$2,000, to which we have referred. Its strange inconsistency with the whole current of his statements on that point, from January 6, 1875, when he reported that settlement to appellee, doubtless to and beyond the time of the conversation with the Hills, can not be explained or rationally accounted for. The amount of the policy, his mission to Chicago, its somewhat disappointing result, and its reluctant acceptance by appellee, were generally known and talked of in that little community. O'Bannon made no secret of it. He enjoined secrecy upon nobody to whom he told it, and he

told it to many persons and on many occasions. Nor was there anything more secret or confidential in his talk with the Hills. J.D. O'Bannon was in the store waiting on customers. Vigus himself had gone out, but for aught that appears was liable to return while that talk was going on. To all these persons on all these occasions he stated that he settled for \$2,000, and could get no more. On what principle or course of human conduct, common or exceptional, can it be believed upon such testimony as Mrs. Hill's, that he told her he collected the full amount, \$5,000?

The theory of appellee's case is itself strongly against it. That is, that on the 4th or 5th day of January, 1875, O'Bannon entered into a conspiracy with Edwards to defraud appellee of \$3,000, by making it to be believed that his claim was compromised for only \$2,000. According to this theory, the most important thing of all he was to do and to keep carefully and constantly in his mind to do, was to conceal the fact that he had collected or received \$5,000 on that policy. It was the very gist of the supposed conspiracy. If he was in it he was bound by every motive of interest, hope and fear to guard against every word or act that might lead to a suspicion of that fact. And yet it is claimed to be overwhelmingly proved that in the open store of his victim, where he had so often and to so many asserted the contrary, without the slightest reason or occasion, and apparently with the utmost coolness and unconcern, he was blabbing the secret he was so vitally interested to keep. And then he went right on for nearly nine years, to the day of his death, living and acting as though he had never either blabbed it or possessed it.

In striking contrast with counsel's view and treatment of this testimony is that of Mrs. Alice O'Bannon, to a statement of Major McWilliams to appellee at her dinner table—a statement of a character not to be misunderstood, nor, with her interest in it, forgotten. She did not pretend to repeat his words, but gave the substance. It is not incredible that McWilliams, for reasons of his own, then thought O'Bannon did get the money, and afterward became convinced that

he did not. It would have been unprofessional in him, as an attorney in the case, to testify for his client at her instance; but no reason is perceived why appellee should not have called him except the apprehension that he would corroborate Mrs. O'Bannon. We do not propose to consider that branch of the case, and refer to this testimony only because it was new on the last trial, and the argument seems to show how far and inconsistently one may believe and disbelieve, according to his interest.

The position of Miller was not materially improved by his last statement, and our opinion of it is unchanged. So, also, as to the alleged statement about the cancer letter.

Questions of law, mainly upon the instructions, have been argued at great length, with an immense array of authorities, but we think it is unnecessary and would be unprofitable to consider them. The objections urged to those given for the plaintiff are for alleged assumptions of fact. Of course the court did not so intend or understand them, as to such facts as were controverted or required to be proved. If, however, the language and punctuation used might have misled the jury, they can easily be made more clearly hypothetical on another trial. From the first we have believed that this case might and should be disposed of on its merits, as shown by the evidence, conceded to be competent and proper. Each of the new trials has deepened and strengthened our convictions as to the facts which should dictate the finding. Upon the question whether R. W. O'Bannon ever received upon the policy anything whatever other or more than the note and check he reported and delivered to appellee, or by conspiracy with Edwards enabled him to get it, we regard the case as not a close one. In our judgment, after three trials, carefully reviewed, the negative is established by a clear and satisfactory preponderance of the evidence—proving not only that the deceased did not commit the wrong shown, but that another, without his concurrence or knowledge, did. Whatever may be claimed for the *prima facie* case for plaintiff, it was overcome and overwhelmed by the defense. Of the receipt, its

integrity as well as its truth, was impeached. What the Supreme Court has said of the weight of a receipt as evidence and of the kind and amount of proof required to overcome it, was said of those conceded or shown to be genuine, and to have been executed as they appear on the trial. That it was forged or altered after its execution, may be proved by a bare preponderance. This was so altered, and by the insertion of a falsehood, as shown by far more than a bare preponderance. The alleged verbal admissions are not truly reported. They were never made. The testimony in relation to them is otherwise easily explained. The more it is considered, in the light of the theories of the case on both sides, of O'Bannon's life and conduct before and afterward, and of the other independent evidence that the fact was not as claimed to have been admitted, the more clearly it is seen to be unworthy of consideration. This verdict, then, is unsupported. On the other hand, it is shown by direct and positive evidence, and not left to inference, that O'Bannon was authorized and expected to compromise the claim; was met with a denial of its justice, an argument against its allowance and an offer of \$2,000; resisted the argument and declined the offer, or left it unaccepted; the next day, upon further argument by Walker reinforcing that of Edwards, agreed to accept it; immediately afterward received the note and check and signed the receipt on the policy left with Edwards; returned home that night and the next day reported to appellee. On maintaining and forwarding his receipt, his agency ceased. The assessment and collection for the loss, the alteration of his receipt, the drawing of the \$3,000 check, its presentation, payment, return and abstraction, all took place afterward, at Chicago, more than two hundred miles from Raymond. We think we know who were concerned in each and all of them. There is not one particle of evidence tending to prove that O'Bannon had any connection with either, except the alleged admissions. The fact that he visited Chicago in the spring, if a fact, at most proves only a bare possibility, most remote. Any and every inference of

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his guilt must presuppose a conspiracy on the 4th or 5th of January, 1875, which could not then have been formed. The conspiracy can not be legitimately argued from assumed facts whose existence must in turn be argued from the assumption of the conspiracy. Excepting the admission, such is, in our opinion, the character of the argument here made, and the claim of such admission seems to us well nigh absurdity.

The verdict, then, was not only unsupported by the evidence, but against the great weight and body of it, and therefore should have been set aside. We can account for it only by the fact that the Supreme Court had reversed a judgment of the Circuit, and of this court, affirming it, in favor of the defendant, and by what, from our observation, seems to be the natural leaning of jurors upon the issue here involved. Of all that they are called on to determine in civil actions, about the easiest to be proved and the hardest to be answered, is that of fraud. In such cases it too often appears that to them, as to the jealous, "trifles light as air are confirmation strong as proof of holy writ."

The judgment of the Circuit Court will be reversed and the cause remanded.

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1. *Judgment or Order in Bastardy—Commitment to Jail—Recitals.*—Under the ninth section of the Bastardy Act, which provides that the defendant shall be committed to the county jail if he refuses or neglects to give the security, the imprisonment is a legal consequence of a failure to comply with the judgment. It is a means provided by law for the enforcement of the judgment, and does not depend upon a recitation in the judgment or order of the court that such means may be resorted to.

2. *Judgment in Bastardy—Sufficiency.*—A judgment has nothing to do with the means provided by law for its enforcement. An order for execution or other process or means of enforcement provided by law is not an integral part and need not be set out in a judgment. So a judgment in bastardy proceedings which did not order that the defendant

be committed to jail if he failed to give the bond required by law, was held good nevertheless.

3. *Judgment in Bastardy—Failure to Provide for Annual Payments.*—The failure of a judgment in bastardy to direct to whom the annual payments should be made, does not invalidate the judgment.

Memorandum.—Order of committal in bastardy proceeding. Appeal from the Circuit Court of McDonough County; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1891, and affirmed. Opinion filed October 17, 1892.

STATEMENT OF THE FACTS BY THE COURT.

At the April term, 1891, of the County Court of McDonough County, the appellant was convicted of being the father of a bastard child of the relatrix, and by the judgment of that court was condemned to pay the relatrix the sum of \$100 for the support of the child for the first year after its birth and to pay thereafter \$45 per annum in quarterly installments for a period of eight years, and required to give bond, with sureties, for the payment of such sums of money. The judgment did not order that he be committed to jail if he failed to give the bond, nor did the order direct to whom the annual payments of \$45 should be made. The order upon appellant's prayer, therefore, granted him an appeal to the Circuit Court of the county, upon his filing, in twenty days, an appeal bond in the sum of \$1,100, with approved security.

The relatrix presented to the County Court, at its June term thereafter, a petition in which she alleged that the appellant had not filed an appeal bond or given security for the payment of the sums of money required of him and had not paid the \$100 ordered to be paid to her, and praying that he be committed to the county jail. The appellant came voluntarily into the County Court at its June term and filed an answer to this petition substantially denying all of its allegations and averring that the court had no jurisdiction to entertain the petition or grant the prayer thereof. The court, after hearing the evidence offered by the parties, found that the appellant had not perfected an

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appeal, paid the money in question or given the security, and entered an order committing the appellant to the county jail until he should comply with the order of the court at its April term or be otherwise lawfully discharged.

From this order the appellant appealed to the Circuit Court of McDonough County, and being there defeated, prosecutes this appeal to this court.

APPELLANT'S BRIEF.

In a conviction for bastardy the judgment should order the defendant committed to jail until he gives bond to make the payments required by the court. *Rich v. People*, 66 Ill. 513.

A judgment can not be changed at a subsequent term unless the judge's minutes show there is a mistake. The court can only correct the mistakes of its officers at a subsequent term, and not the mistakes of the court. *Forquer v. Forquer*, 19 Ill. 67; *Lilly et al. v. Shaw et al.*, 59 Ill. 72; *Cairo & St. L. R. R. Co. v. Holbrook*, 72 Ill. 419; *Lill v. Stookey*, 72 Ill. 495; *Troutman v. Hills*, 5 Ill. App. 396.

A bastardy proceeding is properly and primarily within the jurisdiction of County Courts at their probate terms. *People v. Stevens*, 19 Ill. App. 405.

It is error to make the installments payable to any one but the county clerk. R. S., Chap. 17, Sec. 8; *Moore v. People*, 13 Ill. App. 251.

There must be an issue made before trial. R. S., Chap. 17, Sec. 4; *People v. Woodside*, 72 Ill. 410; *Johnson v. People*, 22 Ill. 314; *Yundt v. People*, 65 Ill. 372; *Price v. People*, 9 Ill. App. 36.

D. CHAMBERS and AGNEW & VOSE, attorneys for appellant.

APPELLEES' BRIEF.

In a bastardy case the first payment does not go to the clerk as a matter of necessity. It is the yearly quarterly payments that must be paid to him. R. S., Sec. 8, Chap. 17.

County Courts have jurisdiction to enforce the collection of judgments in bastardy cases. R. S., Secs 10, 11 and 12, Chap. 17.

The Appellate Court will not consider errors made for the first time in that court. *St. Clair Co. Ben. Soc. v. Fiet-sam*, 97 Ill. 474; *Chicago & Alton R. R. Co. v. Morgan*, 69 Ill. 492; *Thalman et al. v. Carr et al.*, 75 Ill. 385; *The Massachusetts Life Ins. Co. v. Kellogg*, 82 Ill. 614.

Motion in arrest of judgment and for a new trial should have been made in this case. *Barnes v. Baker*, 1 Gil. (Ill.) 401; *Nimmo v. Kuykendall*, 85 Ill. 476; *Bills v. Stanton*, 69 Ill. 51; *Seihil v. Vaughn*, 69 Ill. 257; *Brannan v. Strauss*, 75 Ill. 234.

The appellant can not complain for the first time in the Appellate Court that the Circuit Court erred as to the law applicable to the case, because no propositions of law were submitted to the Circuit Court for its holding. R. S., Section 42, Chap. 17, Practice Act; *The N. W. Ben. and M. A. A. v. Hall*, 118 Ill. 169; *Hobs v. Furgeson Estate*, 100 Ill. 232.

GEO. D. TUNNICLIFF, State's Attorney, L. Y. SHERMAN, and PRENTISS, BAILY & HOLLY, attorneys for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The record does not bring before us for consideration the sufficiency or insufficiency of the evidence. The bill of exceptions made up and signed at the instance of the appellant does not state that it contains all or even any portion of the evidence. It does show the final order and judgment of the court and in this order it is recited that the court heard "the evidence produced by the parties." It is to be presumed, therefore, that the evidence which the court heard was sufficient to warrant the action of the court. We find in the record another bill of exceptions which does purport to preserve all the evidence. This bill was filed for the purpose of bringing before this court, by way of an

assignment of cross-errors, an exception taken by the relatrix to the ruling of the Circuit Court upon a motion made by her to dismiss the appeal of the appellant, and it sets out only the proceedings in the case up to the time when such ruling was made. The statement in this bill that it contains all the evidence must be understood to mean all the evidence produced prior to and upon the hearing of the motion to dismiss. If this latter bill could be brought to the aid of the appellant it would in no wise serve to benefit his cause—for we find from it that by the agreement of the parties the findings of the County Court, as recited in the transcript of the proceedings in that court, were to be received and were received and read in evidence by agreement as competent testimony. That the appellant failed to pay the money or to give the security required by the order of County Court at its April term, or to perfect an appeal from that order, abundantly appears from such transcript.

Indeed it is manifest that the truth of the allegations of the petition was not contested by the appellant in either the County or Circuit Court—but that he and his counsel at every stage of the proceedings relied solely upon the supposed lack of legal power and jurisdiction of the County Court to act upon the petition.

No propositions were presented to the court to be held as the law of the case and we might content ourselves with the observation that the record does not bring before us the questions of law or fact that the appellant seeks to have considered. We have, however, given attention to the assertion that the County Court had not jurisdiction of the petition nor legal power to act upon it.

The action of that court, at its June term, is not, as appellant urges, to be regarded as amendatory of the order and judgment rendered at its April term. While it would have been entirely proper, and perhaps in accordance with the usual practice, to have included in that order or judgment of the April term a declaration that the defendant should be committed to the county jail if he failed to give security or make the payment as required, yet we do not

think the right to thus enforce obedience to the judgment rests at all upon or grew out of such statement. The ninth section of the Bastardy Act provides that the defendant shall be committed to the county jail if he refuses or neglects to give the security. The imprisonment is a legal consequence of a failure or refusal to comply with the judgment—a means provided by law for the enforcement of the judgment—and does not depend at all upon a recitation in the judgment or order of the court that such means may be resorted to. A judgment has nothing to do with the means provided by law for its enforcement. An order for execution or other process or means of enforcement provided by law is not an integral part of a judgment, and need not be therein set out. Black on Judgments, Vol. 1, pages 4 and 8; 7th Amer. and Eng. Ency. of Law, page 119, note 6. The judgment of the April term was complete and needed no amendment to entitle the relatrix to demand its enforcement by the means provided by law. The appellant prayed and was granted an appeal from it upon filing an appeal bond within a specified period. He did not pay the money or give security therefor, as required by law—nor did he perfect an appeal.

The petition filed to the June term brought the knowledge of such default of the appellant to the court as a basis upon which to ground an application for the enforcement of the judgment.

The court found upon hearing, to which the appellant voluntarily submitted himself, that its order and judgment had not been complied with, and, as we think, properly ordered that the appellant be committed to the county jail, as provided by Sec. 9 of the Bastardy Act. At its April term the court might, no doubt, have committed the appellant to the custody of its officers or to the county jail until an appeal bond had been filed or security given for the payment of the money ordered to be paid, but this course was not imperative, nor was the right to enforce compliance by imprisonment lost, by reason of the leniency of the court in this respect.

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Upon proof of non-compliance, afterward made, the judgment could lawfully be carried into execution in the manner pointed out by the statute.

All other complaints of the appellant relate solely to mere irregularities in the course of the trial at the April term of the County Court and can not avail the appellant in this, a mere collateral proceeding thereto.

The order and judgment of the Circuit Court must be and is affirmed.

Consolidated Coal Co. of St. Louis v. Hænni.

48	115
148	614
48	115
115	618

1. *Master and Servant—Risks Assumed by the Servant—Extra Risks.*—It devolves upon the master to prepare the appliances and machinery to be used in and about the business engaged in, with such reasonable care that the servant will not be exposed to perils beyond such as pertain to the work. Extra risks resulting from a failure of the master to discharge this duty do not come within the danger assumed by a servant.

2. *Master and Servant—Notice of Defects.*—Where appliances are contrived and constructed for temporary use without the assistance or knowledge of the employe, not in his care or control, never having operated them or had an opportunity to inspect them, the employe is not chargeable with notice of their defects, either in plan or construction.

3. *Fellow-Servants.*—A person was employed as a "mine blacksmith for Mine No. 10;" the employer (a corporation) was about to raise a smoke-stack from the ground and place it in position on a base prepared for it on the roof of the boiler-house of "Mine No. 9." No particular servants of the company were charged with the duty of raising stacks. Such work being required only at long intervals, it was customary to call upon any of its employes to assist in the work, and so notified the blacksmith, while he was at work at his anvil, to assist in raising the stack. While doing so, appliances gave way and the stack fell upon him and he was injured. The mode of doing the work of arranging the ropes and pulley by which the stack was to be raised was devised and constructed by servants of the company who were superior in authority to the blacksmith, and with whom he in no wise co-operated in the work, nor was he consulted about it. Under such circumstances the fact that the arrangements were made and machinery constructed and furnished by other servants of the company will not relieve the common master from liability arising from a defect in the machinery or from a lack of ordinary care and skill in the preparation of the contrivances to do the

work of raising the stack. The relation of fellow-servants does not exist between them and the blacksmith.

4. *Employee's Right to Assume that Appliances, etc., are Reasonably Safe.*—Where an employe of a company is unexpectedly called upon to assist other servants or employes of the company in performing a work not in the usual line of his employment, for instance raising and placing in position a smoke-stack, without an opportunity of seeing or knowing whether the appliances are properly constructed or in fit and safe condition for the work, such employe has the right to assume that the arrangement of the appliances and machinery for performing the work had been so skillfully and carefully planned and executed that those assisting in operating would not be unreasonably exposed to danger other than such as was inseparable from the character of the work about to be done.

5. *Co-employes—Lines of Employment—Emergencies.*—An employe called upon, without previous notice, to assist other employes of a common master in the performance of a work of an emergency character, and not in his ordinary line of employment, is warranted in supposing that such care has been taken and such skill and intelligence employed in preparing for the work, that he would not be exposed to additional danger from the slightest indiscretion of another workman or from a slight disarrangement of the appliances.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Macoupin County; the Hon. JAMES A. CREIGHTON, Circuit Judge, presiding. Heard in this court at the November term, 1891, and affirmed. Opinion filed October 24, 1892.

STATEMENT OF THE CASE BY THE COURT.

The appellee was in the service of the appellant company as a "mine blacksmith" for Mine No. 10. On the first day of August, 1890, the appellant company desired to raise a smoke-stack from the ground and place it in position on a base prepared for it on the roof of the boiler house of Mine No. 9. The stack was of iron, a round, smooth cylinder about 35 feet long, 2½ feet in diameter, and weighed 3,800 pounds. No particular servants of the appellant company were charged with the duty of raising stacks. Such work was only required to be done at long intervals, and it was customary to call upon any of its employes to assist in the work of pulling at the ropes, by which the stack was to be raised. The appellee, while at work at his anvil, was notified to so assist on the occasion named, whereupon he left

this blacksmith shop at mine No. 10 and went to mine No. 9, where the stack was to be put up. When he arrived upon the ground the arrangements for hoisting the stack had been completed, the appellant company having, through men deemed competent for the purpose, prepared the guy pole, blocks and tackle and ropes, and attached them to the stack as by them deemed proper. The appellee was, with others, called to pull upon the ropes. While so doing, the stack fell, and striking the right leg of the appellee, cut it off below the knee. The fall of the stack is claimed to have occurred because of the alleged negligent manner in which the ropes and blocks and tackle were arranged, connected and attached to the stack. A guy pole, forty-four feet in height, had been erected, extending to the roof of the engine house, at a point conveniently distant from the place where it was intended the stack should stand.

At the top of this pole was a hook, to which was suspended a block and tackle. At the bottom of the pole was a snatch block. Around the smoke-stack, which lay upon the ground, a rope had been twice passed and so tied as to leave a projecting loop. Another rope passed through the snatch block at the bottom of the guy pole, then up the pole to and through the pulleys of the block and tackle, out its top, and from there to and through the pulley of another block and tackle, the hook of which was hooked into the loop in the rope that encircled the stack. The stack was to be raised by the strength of men pulling upon the rope horizontally from the snatch block at the foot of the pole. There was tied around the stack near its lower end another rope of sufficient length to be held by men upon the ground for the purpose of steadying and balancing the stack and pulling it into position upon the base prepared for it when it should be raised to the proper height. The appellee was directed to pull upon this balancing or steadying rope. When the stack had been raised about fifteen feet it slipped for near a foot through the rope that was twice around it. The loop of that rope slipped out of the hook of the block and tackle, and the stack, having nothing to support it, fell upon

the roof of the boiler house and rolled from there to the ground where it struck and cut off the right leg of the appellee.

Upon a trial before a jury a verdict was rendered against the appellant in the sum of \$5,000. In addition to the general verdict the jury returned a special finding as follows:

Question. Of what acts of negligence was defendant or its servants guilty which caused plaintiff's injury?

Answer. First, by removing plaintiff from his professional job; second, by improper arrangements for raising the smoke-stack.

This is an appeal from a judgment rendered upon the verdict of the jury.

CHARLES W. THOMAS, attorney for appellant.

GEORGE L. ZINK, and JAMES M. TRUITT, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

If it be conceded that it was the duty of the appellee, though employed as a mine blacksmith, to assist in raising the smoke-stack, it would only follow that he assumed the risks and hazards ordinarily attendant upon such an undertaking.

It devolved upon the appellant company to prepare the appliances and machinery to be used in hoisting the stack with such reasonable care and skill that the appellee would not be exposed to perils beyond such as pertained to the work. Extra risks, resulting from a failure of the master to discharge this duty, do not come within the danger assumed by a servant. *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 110; *Chicago and North Western R. R. Co. v. Jackson*, 55 Ill. 492.

In the instance at bar, the appliances were contrived and constructed for temporary use without the assistance or knowledge of the appellee. They were not in his care or

control, nor had he ever operated them or had an opportunity to inspect them, and therefore he is not chargeable with notice of their defects either in plan or construction.

The mode of doing the work, the arrangement of ropes, pulleys and pole, was devised and constructed by servants of the appellant who were superior in authority to the appellee, and with whom he in no wise co-operated in the work, nor was he consulted about it. Under such circumstances the fact that the arrangements were made and machinery constructed and provided by other servants of the company, would not relieve the common master from liability arising from a defect in the machinery or from a lack of ordinary care and skill in the preparation of the contrivances to do the work. The relation of fellow-servants did not exist between them and the appellee. *Chicago and North Western R. R. v. Jackson, supra.*

When such other servants of the appellant deemed the machinery and appliances completed, the appellee was summoned to come and lay hold upon the ropes and take part in the hoisting of the stack, without opportunity to see or know whether the appliances were properly constructed or in fit and safe condition for the work.

He had, therefore, the right to assume that the arrangement of ropes and pulleys and the manner of their attachment to the stack had been so skillfully and carefully planned and executed that those assisting in operating them would not be unreasonably exposed to danger other than such as was inseparable from the character of the work about to be done. He was warranted in supposing that such care had been taken and such skill and intelligence employed in preparing for the work that he would not be exposed to additional danger from the slightest indiscretion of another workman or from a slight disarrangement of the appliances. *Toledo, Wabash and W. R. R. Co. v. Fredericks* 71, Ill. 294.

Whether the appliances provided were reasonably safe, efficient, and properly constructed and connected, was a question of fact for the determination of the jury. The

special finding of the jury was against the appellant on this point. We think there is no substantial objection to the instructions given the jury, and it only remains to be seen if there is sufficient evidence to support the conclusion reached by the jury.

We think the evidence clearly shows how and why the stack fell. It was a round, smooth iron stack, weighing nearly two tons. A rope, in which a loop was formed, passed twice around it at a point nearer the upper than the lower end. Into this loop was thrust an open hook, attached to a block and tackle, through the pulleys of which passed a rope that extended to the block and tackle at the top of the guy pole and from thence to the snatch block at the bottom of the pole, and thence into the hands of those who were to raise the stack by pulling horizontally upon the rope.

Another rope was tied around the lower part of the stack, to be used in steadying and pulling it to its place upon the top of the roof.

At the proper time the workmen holding the rope which passed horizontally from the snatch block applied their strength to it, lifted the stack from the ground and drew it up into the air—its upper end pointing directly to the top of the pole, and its weight held and sustained by the loop of the rope which had been placed in the hook of the block and tackle.

The great weight of the stack held the rope tense and taut in a straight line from the top of the pole to the point of the connection of the hook and the loop. While it was thus suspended in the air about fifteen feet above the ground, the stack, owing to its smooth surface, slipped and dropped for a distance of near one foot through the rope that encircled it, thus suddenly relieving the tension of the pulling rope, which at once slackened, dropped the hook out of the loop, and the stack, left without support, fell to the ground. A sudden slacking of the rope from any other cause would have produced the same result.

Had the stack struck and its weight rested upon the roof, the same result would most probably have followed. Any

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sudden jerking of the pulling rope, with the consequent reaction, might have dropped the hook from the loop. We may safely venture the assertion that all who were engaged in the operations of that day would decline to assist in raising another stack with the same arrangements of hooks and loops.

Experience has shown its hazards, and in the view of the jury, ordinary prudence and foresight, and the consideration of universally known natural laws, would have made them apparent in advance to any one qualified and competent to adopt a plan, and construct and arrange appliances for such dangerous operations.

That an unwieldy iron stack of such great weight, drawn from the ground and suspended in the air above a number of workmen, held only by a loop in a rope thrown over the curve of an iron hook, would endanger the lives of those below, needs but to be stated to be admitted. Safety, it seems, could have been assured from this danger by knotting or tying the loop or rope to the hook, and we can not say that the jury was wrong in holding that a failure to secure it in the hook in some way was not the exercise of reasonable care and skill upon the part of those preparing the appliances for the work. The question was one of fact for the jury, and we do not feel authorized to say from the evidence that the conclusion reached by the jury was manifestly wrong. It is not complained that the damages allowed are excessive. The law of the case was, we think, fairly stated in the instructions. The judgment must be affirmed.

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1. *Receipt—Presumption as to Signature.*—The law presumes that a receipt, regularly executed, etc., as it appears when produced by the party claiming its benefit, was signed by the party sought to be charged; but where the integrity of its statement or the genuineness of the signature is the question, in a civil action, it may be determined, like other ques-

tions of fact, upon a preponderance of the evidence, though the proof, which is the effect of the evidence, is not clear nor unmistakable.

2. *Questions of Fact.*—Where the evidence is conflicting, etc., this court will defer to the judgment of the chancellor, formed under better conditions, etc.

Memorandum.—Vendor's lien. Appeal from the Circuit Court of Schuyler County; the Hon. WILLIAM MARSH, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1891, and affirmed. Opinion filed October 24, 1892.

APPELLANT'S STATEMENT OF THE CASE.

This is a chancery suit commenced by Nelson, the appellee, to enforce a vendor's lien upon real estate sold by him to appellant, Snodgrass. The sale was made October 7, 1890, and the evidence tends to show, on the part of appellee, that it was a cash sale, and that the deed was to be left with one J. N. Rigg, to be held until Snodgrass should pay the whole consideration, \$4,000. On the day of the sale appellant paid \$1,000, and on October 14, 1890, he paid \$2,600—leaving \$400 due and unpaid, and which is sought to be recovered in this proceeding. It was claimed that Snodgrass prevailed on Rigg to let him have the deed to have it examined, and then placed it on record and borrowed \$2,700 by mortgage on the land. Snodgrass filed an answer denying the allegations of the bill alleging indebtedness, and that he unwarrantably got possession of the deed and retained the same; also alleging that he got possession of the deed pursuant to the contract, and fully paid all the purchase money before the commencement of the suit. The evidence on the part of the appellant tends to prove payment, and also to impeach the general reputation of Nelson for truth and veracity. Snodgrass also exhibited a receipt in full, signed by Nelson, for all the contract price, but Nelson claimed that the words "in full" were not in the receipt when he signed it, but were interpolated afterward.

The decree was in favor of Nelson. The only question in the case is whether or not the \$400 has been paid.

Receipt read in evidence.

"Memorandum:—Received of J. C. Snodgrass, twenty-six

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hundred dollars in full payment on farm this 14th day of October, 1890. E. D. Nelson.”

W. L. VANDEVENTER and S. B. MONTGOMERY, solicitors for appellant.

E. J. PEMBERTON and WM. PRENTISS, solicitors for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

This was a bill filed by appellee to enforce a vendor's lien for a balance of \$400, claimed to be due and unpaid on the sale of a farm to appellant. The answer set up payment, on which issue was joined by replication.

Upon this issue, the burden of proof was on the defendant. He testified that he paid the \$400 in question to complainant in currency, on the highway, when nobody else was present, without taking any receipt for it at the time. Complainant as positively denied the alleged payment. Other witnesses were introduced by each party to prove circumstances in corroboration of his statement, and some by defendant to impeach the complainant's general reputation for truth. Excepting a certain receipt given at the time and for the amount of a payment which defendant admitted was made after the one in dispute, and which purported, when offered in evidence, to be “in full,” but which complainant testified did not so appear when he signed it, all of the evidence taken was oral, affording the chancellor a great advantage over us in means of determining the degree of credit due to the witnesses. He found the issue for the complainant and entered a decree accordingly, which defendant here seeks to reverse, as being against the evidence.

The record presents the single question of the preponderance of the evidence as to the simple fact of the particular payment so alleged and denied. After careful consideration of it, and of the earnest argument for appellant, we are not

satisfied that the chancellor erred in his finding. It would be unprofitable to discuss the case at length. A statement of our general views must suffice.

The alleged fact in dispute is one simple and isolated. There are no antecedent or subsequent facts more directly tending to prove it than alleged admissions of appellee. No one but the parties is claimed to have witnessed it or any part of it, and no other has absolute or actual knowledge of the truth or untruth of the allegation. We understand that in this respect it differs from the cases of *Booth v. Hynes*, 54 Ill. 363, and *Belden v. Junis*, 84 Ill. 78.

Of the alleged admissions, the one which seems to be regarded by counsel as most strongly supporting the appellant, is the receipt. In our judgment, it rather discredits him. What the Supreme Court said of the weight of a written receipt as evidence, and the necessity of clear and unmistakable proof to do away with its force, in *Winchester v. Grosvenor*, 44 Ill. 425, and other cases cited, is the rule where the genuineness and integrity of the instrument is unimpeached and the only question is as to its truth according to its plain import. It assumes that the receipt, as it appears when produced, was signed by the party sought to be charged. But where the integrity of its statement or the genuineness of the signature is the question, in a civil action, it may be determined, like others, upon a preponderance of the evidence, though the proof, which is the effect of the evidence, is not clear nor unmistakable.

It is true that where a finding against the holder would involve the imputation of a crime, the presumption of innocence should have some consideration as evidence, but not as of the force given it in criminal cases, to be overcome only by proof of guilt beyond a reasonable doubt. In this case, perhaps that presumption is entitled to less weight than it otherwise would be, even in a civil case, from the fact that, without reference to the alleged receipt, a finding against the defendant involved the imputation of the kindred crime of perjury, as to which the presumption of innocence in favor of the complainant, who was involved in like manner, was a full offset. If the evidence was sufficient to

overcome the presumption of his innocence of perjury, it would hardly fail to overcome also that of his innocence of forgery. In reference to the integrity of the receipt, as to the direct fact of payment, it was oath against oath. What, in our judgment, makes the matter of the receipt discredit rather than support him, is that it was claimed on the trial to be apparently, on its face, altered by addition; that it was submitted to the chancellor's inspection, and that with his knowledge of the weight to be given to these presumptions and to the other evidence, he found against appellant. If he had found it unaltered, we apprehend he would have held it conclusive in his favor, and that he was aided in his finding by the inspection.

Of the oral evidence, little need be said. So far as it is claimed to have been corroborative of one or contradictory of the other party, it depended largely upon recollection of the precise language used in verbal statements, and of the times and order of divers alleged occurrences. Accuracy as to such matters is hardly to be expected from the best intention of witnesses. Hence their uncertainty and changes of statement may as well be due to candor and truthfulness as to the opposite traits. The appearance and manner of the witness in such cases is all-important to the determination of their credibility. The chancellor, therefore, could weigh this class of evidence more intelligently and justly than we. So, also, of impeaching evidence. We all know something of that from observation in our own practice, and think an average judge hearing it is better qualified to estimate it rightly than an average jury.

On the other hand there may have been apparently good reason for suspecting the motive of defendant in getting possession of the deed and failing to return it as he did. According to his statement the meeting arranged, for the morning the alleged payment was made, for a full settlement by payment of the balance on the price, \$3,000; and when they met, it was said they could "settle right there." Then why pay out, on the highway, all the cash he had, when he needed it in his business, wanted to buy and pay for a cow at the sale to which they were immediately going,

and yet it left \$2,600 to be paid in order to affect or complete the settlement? And why not take a receipt for the money then paid, if any was then paid, since he was so careful to take one when he paid in checks that could be traced, and in presence of witnesses?

But we forbear further comment on the parol evidence, and defer to the judgment of the chancellor formed under better conditions than ours. It is by no means clear to us that he erred, and his decree will therefore be affirmed.

Hoke v. Lowe.

1. *Former Adjudication.*—H. sold a mowing machine to L. for \$55, telling him he would have to have the money on the first day of September, as Deering & Co.'s agent would be there on that day, and he would have to pay for all machines he had sold. L. did not pay for the machine. H. paid Deering & Co. for it and sued L. for the price. On the trial it was shown that Deering & Co. had sued L. for the same machine, and on the trial of that suit L. testified that he owed H. for the machine and not Deering & Co.; that he bought of H. and did not know Deering & Co. in the transaction. A judgment against Deering & Co. followed. Upon the trial of this suit in the court below, L. insisted that the adjudication in that suit was a bar to this, and asked for and got from the court the following instruction: "The court instructs the jury that if they believe from the evidence that the same identical subject-matter involved in the former suit testified to was the same that is involved in this suit, and that such subject-matter has been adjusted, then in that case you should find for the defendant." *It was held* error, as the evidence offered no ground for the hypothesis that the subject-matter of the suit was involved in the former, but was against it. It was not the machine but the indebtedness for it that was the subject-matter of both these suits.

Memorandum.—Action of assumpsit. Appeal from the County Court of Moultrie County; the Hon. JOHN D. PURVIS, County Judge, presiding. Heard in this court at the November term, A. D. 1891. Opinion filed October 24, 1892.

The opinion states the case.

MEEKER & PATTERSON, attorneys for appellant.

APPELLEE'S BRIEF.

It is insisted that the law as laid down in the case of Fred Bennett et al. v. Wilmington Mining Co. et al., 18 Ill. App. 17, covered every point in this case as to the plea of former adjudication and that the parties and subject-matter involved in this suit were *res adjudicata*.

JENNINGS & HUFF, attorneys for appellee.

OPINION OF THE COURT.

The declaration in this case filed by appellant against appellee contained three counts in *indebitatus assumpsit*—the first, for a mowing machine sold and delivered to defendant, and the second for goods sold and delivered, and the third for money paid out for defendant at his request. The pleas were the general issue, set-off, and former adjudication. To the last a demurrer was sustained and the cause was tried upon issue joined to the others. No evidence was offered in support of the plea of set-off. Verdict and judgment for defendant.

The County Court should have set this verdict aside and granted a new trial, as moved by plaintiff. It was palpably against the law and the evidence, and can hardly be accounted for on any other supposition than that the jury were misled by an instruction given for the defendant.

Plaintiff testified that he sold the machine in question to defendant the last of May or first of June, 1890, for \$55; that he told defendant he didn't need the money then, but would have to have it on the first day of September following; that Deering & Co.'s agent would be there on that day, and he, plaintiff, would have to settle up with them and pay them for all the machines he had sold; that defendant took the machine and agreed to have the money ready and pay him for it at that time; that defendant had not paid him and still owes him for the machine; and that he, plaintiff, had paid Deering & Co. for it before the commencement of this suit. There was not one word of testi-

mony contradicting this statement, or any part of it. Defendant himself did not appear as a witness.

But it was shown that in February, 1891, a suit was brought by Deering & Co., against appellee for the price of this machine before a justice of the peace, from whose judgment an appeal was taken to the Circuit Court, where the cause was tried *de novo* before a jury at the April term; and three witnesses were produced who testified that on the trial before the justice of the peace, or on appeal, appellant swore as a witness that appellee did not owe him anything. Appellant, however, produced three jurors in the trial of the appeal, and four others in attendance, who testified that on that trial appellee swore he did owe appellant and not Deering & Co. for the machine; that he bought it of appellant, and did not know Deering & Co. in the transaction; and three of them stated that, as further showing that it was with appellant in his own right, he swore it was agreed between them that payment in part should be made in livery to him. The verdict on that trial was for the defendant, for the reason, as one of them testified on this, that the jury believed the indebtedness for the machine was due to the appellant here and not to Deering & Co. Counsel strenuously and strangely insist that the judgment in that case was an adjudication against the appellant here. They asked and got from the court below the following instruction:

“The court instructs the jury that if they believe from the evidence that the same identical subject-matter involved in the former suit testified to was the same that is involved in this suit, and that such subject-matter has been adjusted, then in that case you should find for the defendant.”

The subject-matter of the former suit was the alleged indebtedness of Lowe to Deering & Co. for the machine here in question, and how an adjudication that there was none from Lowe to Deering & Co. for it could determine that there was none to Hoke, passes our understanding. It was not denied in that case that Lowe bought the machine and was indebted for the price to somebody, but the question, and the only question was, to whom. Deering & Co.

claimed it was to them. Lowe claimed it was not to them because it was to Hoke, and now claims, because the jury found it was not to Deering & Co. that such finding and the judgment thereon conclusively proved that it was not to Hoke. It may be presumed that this idea would not have occurred to court or counsel but for the fact that Hoke himself testified to his opinion that Lowe owed him nothing; and yet it is clear that a verdict and judgment for the defendant would have had the same legal effect as an adjudication, if Hoke had not testified at all. Had his statement been an admission of fact it would have been entitled to great weight as against him; but being mere matter of opinion, it was entitled to none. Whether Lowe owed him or not depended on the facts, and not at all upon Hoke's opinion. Lowe's testimony was an admission of the facts that he bought the machine of Hoke, that Deering & Co. were not known in the transaction, and that Hoke agreed to take part of his pay in livery for himself, which an agent to sell property for another would not be authorized nor apt to do.

The evidence offered no ground for the hypothesis that the subject-matter of this suit was involved in the former, but was all against it. It was not the machine, but the indebtedness for it, that was the subject-matter of both these suits. Upon the uncontradicted facts in evidence, appellee is indebted for it either to Deering & Co. or to appellant, and according to an adjudication, binding upon him because he was a party to it, he was not indebted to Deering & Co. There is no evidence in the record that he has paid anybody for it. The proof is that appellant sold and delivered it to him; that he was responsible for the proceeds to Deering & Co. and that he has paid them. The clear inference is that he sold it to appellee on his own responsibility, as was understood by appellee, and is entitled to recover the price agreed on. The County Court erred in giving the instruction quoted and in refusing the motion for a new trial. Its judgment is therefore reversed and the cause remanded.

Toledo, St. L. & K. C. R. R. Co. v. Anderson.

1. *Statutes—Construction.*—Section 1½ of the act in relation to fencing and operating railroads, approved March 31, 1874, declaring it to be the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds or other dangerous combustible material, and for neglect shall be liable to all the penalties named in section 1 of the same act, requiring them in the cases and with exceptions specified to erect and construct cattle guards to prevent live stock from getting on the road, the penalty therein named for neglect to do so being a liability to the amount of damages done by their agents or cars to stock, and reasonable attorney fees in any court wherein suit is brought for such damages were imposed, *held*, that the attorney fees were imposed as a penalty for the destruction of inanimate property by fire occasioned by dry grass, etc., being left upon its track, in addition to the actual damage.

2. *Railroads—Attorney's Fee—Action for Damages by Fire.*—In an action against a railroad company for damages by fire communicated from an engine by dead grass and dry weeds negligently left on its right of way, and for an attorney's fee, as a penalty under sections 1 and 1½ of the "act in relation to fencing and operating railroads," approved March 31, 1874, and the amendments thereto, the court gave the following instruction to the jury: "If you find, gentlemen of the jury, from the evidence in the case, that this fire was set by a passing engine on this railroad, then of course they are liable for damage done by fire; and if the fire originated inside of the right of way, on account of the right of way being in a foul condition with dead grass and dry weeds upon it, whereby the fire was started, and from that carried over to the meadow and from there to the stacks, then Mr. Anderson is entitled to receive his attorney's fee in addition to the damage he sustained, which is agreed in this case to be \$15. If the fire originated outside the right of way in the meadow, then he would not be entitled to his attorney's fee, but he would be entitled to his damage for the hay and rails. You can render the verdict, gentlemen, according to the evidence and the instruction, and bring it into court. If the court is not in session, sign and seal it and give it to the bailiff. The form of the verdict will be, 'We, the jury, find for the plaintiff and assess the damages at' so much, the amount you agree upon including the attorney's fee or not, as you may find, from the evidence, where the fire originated." *It was held*, that since 1879 the statute has imposed for the wrongs complained of as a penalty, in addition to the actual damages, a reasonable attorney's fee, and that the instruction was right.

Memorandum.—Action for damages from fire. Appeal from a judgment rendered by the Circuit Court of Coles County; the Hon. JAMES

T., St. L. & K. C. R. R. Co. v. Anderson.

F. HUGHES, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1891, and affirmed. Opinion filed October 24, 1892.

The opinion of the court states the case.

APPELLANT'S BRIEF.

The court erred in instructing the jury that appellee was entitled to recover attorney's fees in case fire started on right of way by reason of dry grass and weeds being thereon. In 1879, section 1 of the act in relation to fencing and operating railroads, approved March 31, 1874, was amended by inserting the clause with reference to attorney's fees. Section 1, page 224, Act of 1879. The present statute is the same as that of 1879.

It is a familiar rule of law that penal statutes should be strictly construed. *Edwards v. Hill*, 11 Ill. 22; *Erlinger v. Boneau*, 51 Ill. 94; *C. & N. W. Ry. Co. v. Stambro*, 87 Ill. 195; *People v. Utica Cement Co.*, 22 Ill. App. 159; *People v. Peacock*, 98 Ill. 172.

There is no penalty provided in section 1 for damages caused by allowing dry grass and weeds to grow upon right of way. Section 1½ is now as it was enacted in 1874, but section 1 has been changed twice since. Whether there is any penalty at all provided for in that section in the strict sense of the word is doubtful. From 1877 to 1879 there was no pretense of any penalty; the party injured simply received compensation for stock damaged by reason of want of fence. What penalty is referred to in section 1½? Evidently not attorney's fees, for, as before stated, section 1½ was passed in 1874, and not till 1879 was the clause with reference to attorney's fees inserted. Can it be claimed that the penalty is an ever-changing one and attaches to whatever penalty may at any time be named in section 1?

WILEY & NEAL, attorneys for appellant.

APPELLEE'S BRIEF.

"When there is no conflict in the evidence, no dispute as to the facts, there is nothing to submit to the jury, and the

question is one of law. * * * In such cases it is proper for the court to direct the verdict, and a verdict thus ordered will be sustained if the law and the facts disclosed by the evidence warrant it." Thompson on Trials, Vol. 2, Sec. 2243, p. 1597; Noyes v. Rockwood, 56 Vt. 647.

Under the first count of the declaration all that plaintiff was required to show, was that right of way was foul with dead grass, dry weeds, etc., and that the fire originated thereon and communicated to the hay, etc., of plaintiff. The Pittsburg, Cincinnati & St. Louis Ry. Co. v. Campbell, 86 Ill. 443.

Under the second count, to make *prima facie* case, it was only necessary to prove that the fire was communicated by a passing locomotive of defendant. S. & C. Annotated Stat., Sec. 1, p. 1949.

In our view of this, sections 1 and 1½ in fact constitute but one section and should be so considered.

The duty to fence the right of way, and keep the same clear from dangerous combustible matter, is imposed by the statute, and a failure to comply with either is negligence. Pittsburg, Cincinnati & St. Louis Ry. Co. v. Campbell, 86 Ill. 413.

The attorney fee is in the nature of a penalty for non-compliance with a statutory duty. Peoria, Decatur & Evansville Ry. Co. v. Duggan, 109 Ill. 537.

The penalty referred to in section 1½ is the same penalty or remedy provided by section 1, viz., damages sustained and reasonable attorney's fees.

In construing statutes the intention of the law maker is sought; the mischief which the law was intended to remedy is oftentimes resorted to to ascertain such intention. Ball v. Chadwick, 46 Ill. 28.

When the evidence shows that the right of way was not kept clear of dry grass, etc., and fire originated thereon, a recovery could be had under section 1½. C. & E. I. R. R. Co. v. Goyette, 32 Ill. App. 574.

E. P. ROSE, attorney for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

July 13, 1890, a fire consumed some hay, rails and hedge of appellee, for which he brought this action, claiming that it was communicated from a locomotive engine of appellant by dead grass and dry weeds negligently left on its right of way. In addition to the value of the property so destroyed, he claimed an attorney's fee, as a penalty; and it was agreed that if so entitled, fifteen dollars was a reasonable amount. The jury were instructed that if they found the fact to be as claimed by plaintiff they should allow it; which they did, and it was included in the verdict and judgment.

It is not denied that the evidence clearly tended to prove the case as alleged, but the question made is whether any such penalty was prescribed by the statute.

Section 1½ of the "Act in relation to fencing and operating railroads," approved March 31, 1874, declares "it shall be the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds, or other dangerous combustible material, and for neglect shall be liable to the penalties named in section 1."

Section 1 required them, in the cases and with exceptions specified, to erect fences and construct cattle guards to prevent live stock from getting on the road; and the only penalty "named" therein for neglect to do so was a liability for "double the amount of damages" thereby done by their agents, engines or cars to such stock. By an act of May 23, 1877, it was amended by reducing the liability to actual damages so done; and, finally, by an act of May 29, 1879, it was further amended by adding to the liability clause the provision "and reasonable attorney's fees in any court wherein suit is brought for such damages, or to which the same may be appealed."

Section 1½ has never been (amended) changed, or expressly repealed, but been continued in the authorized revisions and publications of the statutes precisely as originally enacted; and the vindicatory part of section 1 has remained unchanged ever since the passage of the amendment last above

referred to. So when the act here complained of was committed, the statute relating to it, as published by authority of the legislature, was, and for more than ten years had been, just as it appeared when this suit was brought, and still appears. It is, therefore, clear that if the vindictory part of section 1½ has any force, it prescribes as a penalty for neglect to comply with the mandatory part, causing damage, the payment of reasonable attorney's fees in any suit properly brought to recover such damage; for it prescribes no other, nor even, according to the contention of appellant, any liability for actual damages.

The position taken is that when it was enacted the only penalty "named in section 1" being double the amount of the damages done, the legislature must have intended nothing else for a violation of section 1½; that its operation as originally intended can not be diverted or extended by any subsequent amendment of a preceding section which does not express or in some way manifest an intention to that effect, and that by the amendment of 1879 no such intention was manifested.

We agree that it is a question of legislative intention, but hold that this might be shown otherwise than by the terms of the amendment, and are of opinion that it was so shown in this instance.

The object of section 1 was the protection of live stock, that being the kind of property peculiarly exposed, and the penalty prescribed for neglect to comply with its requirement was double the amount of damage thereby done to such stock. That of section 1½ was not so limited, but had reference to combustible property of all kinds; and yet the penalty for neglect in that case was the same. By the strict letter of that section, then, no penalty could be recovered for inanimate property destroyed or damaged through neglect to obey it. But we apprehend that no court would so construe it. The intention of the legislature clearly was to place violations of section 1 and of section 1½ upon a like footing as to penalty, by making it in each case double the amount of damages thereby done to the property exposed;

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live stock in one, and inanimate property, real or personal, in the other. This is plain enough from the language used in the latter section, though it might have been better expressed. The penalty intended could be there indicated as well by reference to the preceding section as by its repetition or statement in full. Any subsequent legislature could abolish or change the penalty thus prescribed for both or either of these wrongs; and that a change expressed in the first, with a retention of the reference in the second, would affect a like change in the latter, seems to us a proposition too simple for analysis and too obvious for argument. That is just what the legislature of 1879 did. Whether the prescription of the penalty in the original act had or had not ceased to be operative under the intervening amendment of 1877, that would not interfere to prevent this effect of its action. It found section 1½ with its reference to the penalties named in section 1, still on the statute book, prescribed a penalty in section 1 which would make such a reference operative, and then left it as it found it, section 1½ of the act. This was a recognition or adoption, amounting in legal effect to a re-enactment of it.

We therefore hold that ever since 1879 the statute has imposed for the wrong here complained of as a penalty, in addition to the actual damage, a reasonable attorney's fee, and the instruction on that point was right. The evidence on the part of plaintiff was positive, full and clear, and none whatever was offered on that of defendant. The liability for a reasonable attorney's fee was, therefore, the only question in the case. Judgment affirmed.

Shinn v. Matheny.

1. *Agency—Burden of Proof.*—In a controversy between parties litigant as to whether a person was the agent of and authorized to bind the defendant, the burden of proof is upon the plaintiff.

2. *Agency—Presumption.*—The presumption of agency arising from the fact that the defendant owned a house being remodeled, and had

knowledge of the work which was done upon it, including that done by the plaintiff, and furnished a part of the money to pay for such remodeling, is a presumption of fact and may be rebutted.

3. *Mechanic's Liens—Filing Statement.*—On the question as to whether section 4 of the Mechanic's Lien Law as amended in 1887 (Laws 1887, 219), providing for the filing of a statement of his claim by a person claiming a lien, is an essential condition of his right to file his petition, or applies only as between the lien claimant and other creditors, or incumbrancer or purchaser, and not as between such claimant and the debtor, the inclination of the court is that it is an essential condition of the right to bring a suit for a lien, etc.

Memorandum.—Petition for mechanic's lien. Appeal from a decree dismissing the petition, entered by the Circuit Court of Sangamon County; the Hon. JAMES W. CREIGHTON, Circuit Judge, presiding. Heard in this court at the November term, 1891, and affirmed. Opinion filed October 24, 1892.

APPELLEE'S STATEMENT OF THE CASE.

Appellant on October 11, 1887, filed a petition for mechanic's lien for services as architect in preparing plans and drawings for remodeling a dwelling house belonging to appellee, and also for superintending part of the work of remodeling and improving said house, alleging that the contract for such services was made through John N. Dixon, as agent of appellee, and that the time the same should be paid for, was not specifically agreed upon, but that by means of the rendering of the services she became liable to pay within a reasonable time, to wit, on September 1, 1887, so much as said services were reasonably worth. Appellee denied that she employed appellant to perform the services stated, either directly or through any agent; that John N. Dixon was her agent for that purpose, or that she authorized him or any one else to employ appellant in and about said work, and that she owed appellant the sum claimed. On the hearing the court dismissed the bill, no reasons being stated.

GROSS & BROADWELL, attorneys for appellant.

APPELLEE'S BRIEF.

The remedy sought by this proceeding is exclusively the

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creature of the statute, and without the aid of the statute, can not be maintained. Such lien is unknown either at law or in equity, and independently of the statute no equitable principles exist which can come to the aid of the creditor. Phillips on Mechanics' Liens, Sec. 297; McCarthy v. New, 93 Ill. 455; Crowl v. Nagle, 86 Ill. 437.

The statute must be strictly construed. Cook v. Heald, 21 Ill. 429; McDonald v. Rosengarten, 35 Ill. App. 71.

The statute in force when the contract of appellant was made, conferred the right to a lien; the remedy must be sought under the amended law. The suit was commenced long after July 1, 1887. Garrett v. Stevenson, 3 Gilm. 263; Dobbins v. First National Bank, 112 Ill. 562; Phillips on Mechanics' Liens, Sec. 24.

The contract was not made with reference to the land sought to be subjected to the lien which is necessary to the assertion of the right. Wendt v. Martin, 89 Ill. 139.

The credit having been given to and the services rendered upon the responsibility of a person not the owner of the premises, and with knowledge of all the facts, no lien can be created on the property of appellee. Wendt v. Martin, 89 Ill. 139; Proctor v. Tows, 115 Ill. 138; Little v. Vredenburg, 16 Brad. 189.

CONKLING & GROUT, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

This was a petition filed October 11, 1887, by appellant, an architect, to enforce a lien for plans and specifications for, and superintending work in remodeling the dwelling-house of appellee, in the city of Springfield. It alleges that the agreement for his services was made verbally with John N. Dixon, as agent of appellee, in April, 1887; that no time was thereby fixed within which he was to do the work, nor any price for it, but the plans and drawings were to be made and delivered in a reasonable time, and on delivery he was to be paid a reasonable price; that he made them

accordingly, and they were delivered to and accepted by appellee and used in the remodeling and improvement of said dwelling; that while the work was going on, at the request of appellee he superintended it, without any express agreement as to amount of compensation or time of payment, and appellee thereby became liable to pay him a reasonable compensation therefor within a reasonable time, to wit, on the first of September, 1887; that said plans, drawings and superintendence were reasonably worth the sum of \$245, and payment thereof was due September 1, 1887, but no part of it has been paid.

The answer, which was not under oath, admitted none of these allegations except that of her ownership of the dwelling-house. It denied that she employed appellant, directly or indirectly; that Dixon was her agent, or that she authorized him or anybody else, to employ him for her, for that purpose; that she accepted any plans or drawings; that he superintended the work at her request, and that anything is due from her to him.

To this answer a general replication was filed, the cause was referred to the master, who reported the proofs, and on the hearing, a decree was made dismissing the petition, on what ground it does not state.

The main question upon the merits is whether appellee was bound by Dixon's employment of appellant. Appellant himself was the only witness in his behalf whose testimony bore directly upon that question. He did not testify that he ever had any direct communication with appellee on the subject of his employment. He did testify that Dixon employed him and said he would pay him, and that he did not say that he was authorized by her, or even that he was assuming to act for her, in the premises. The charges in his books and the bill rendered were against Dixon. His last demand was by a note of September 9, 1887, which was as follows:

"DR. J. N. DIXON, City:

Dear Sir: Yours received, declining to pay bill, so if you do not send check for amount of bill on receipt of this, I

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will proceed to collect same by law. I have charged you a reasonable price for time and material, and propose to have pay for same.

Yours, etc.,
C. W. SHINN."

He claims to have inferred that Dixon was authorized to act, and was acting as agent for appellee, from the facts that she owned the house, that Dixon was her son-in-law, living with her, that he said she was furnishing the larger part of the money for the work, and that when he brought the elevations back he further said they suited the folks at the house. It does not appear that he said or did anything tending to show that he had drawn this inference or had this understanding at any time before he filed this petition. No one would suppose from his note, above quoted, that he then looked to anybody but Dixon for payment. His own testimony, taken by itself, is certainly not conclusive. His other witnesses were Mr. Beam, the carpenter and builder who did the work, and Mr. Bullard, who had drawn some plans for it which were not satisfactory. Beam testified that Dixon agreed with him for the carpenter work, paid him in his own checks, and that he did not know any one else in the matter; and Bullard, that said Dixon employed and paid him and that he had no business transaction with appellee. Their testimony does not materially strengthen that of appellant. What Dixon said in the absence of appellee would not bind her, unless he was her agent or authorized by her to say it.

He testified positively that he was not her agent, nor in any way authorized to bind her in respect to appellant's employment or work, and never so represented; that he was acting for himself in contracting with appellant. His wife was appellee's only child. They had occupied the house together before and expected to do so after its reconstruction. The plans were considered with reference to that expectation, and for the convenience of all, but he understood he was to do as he pleased about the reconstruction. He says he refused to pay the bill because it was largely in

excess of the amount agreed on, which was denied. Appellee was not a witness in the case.

The burden of proof was upon appellant, and we think this statement of the evidence, which embraces the substance of all that was material, obviates the necessity of argument to show that we ought not to disturb the finding of the chancellor. The presumption of agency, from appellee's ownership, knowledge of the work which was to be done and which was done, including that by appellant, and furnishing in part the money to pay for it, is but a presumption of fact which may be rebutted, and we are not prepared to say it was not overcome in this case.

It was not shown that appellant filed any statement of his claim before bringing the suit, and the question is made whether, under Sec. 4, of the Mechanic's Lien Law, as amended in 1887 (Laws of 1887, p. 219), such filing was an essential condition of his right to bring it. Much of the argument on each side is addressed to that question. It is contended for appellant that this section was intended to apply, like Sec. 28 of the act as it stood prior to 1887, only as between the lien claimant and any other creditor, or incumbrancer or purchaser, and not as between such claimant and the debtor; that so to apply it in this case would also give it a retrospective effect, and in any case expose it to the inhibition of Sec. 13, of Art. 4 of the Constitution, as not being germane to the original section. Our inclination is against each of these points, but we do not decide the questions because, irrespective of the effect of said section, we think the petition was rightly dismissed. Decree affirmed.

Sprague et al. v. Foster.

1. *Competency of Witnesses.*—Where a verbal agreement was entered into between two persons and subsequently one of them died and his executor violated the agreement, in an action against him, personally, for damages, the plaintiff was permitted to testify as to what the deceased

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said as constituting the contract. The defendant objected that the evidence was incompetent, because, though the action was against him personally for a tort, he defended on the ground of his right as executor. *It was held* unnecessary to decide the question, as two other witnesses had testified to the same matter.

2. *Statute of Frauds*.—Where a person agreed with another to take and break a pair of mules, for which he was to have use of them for a year, when he was about to take them away it was thought they would not lead behind his buggy, so he left and came back for them the next Saturday. It was claimed that as he did not get possession of the mules for several days after the contract was made, it was not to be performed within a year, and so void under the statute of frauds, but *it was held*, that there was no evidence tending to show that by the terms of the agreement the year was to commence at a future day, but rather that it commenced presently, for the party intended and proposed to take the mules immediately, his right to do so under the agreement not being questioned.

Memorandum.—Action for damages. Appeal from the Circuit Court of De Witt County; the Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1891, and affirmed. Opinion filed October 24, 1892.

The opinion of the court states the case.

APPELLANTS' BRIEF.

The appellee was not a competent witness in his own behalf in this case to testify to the supposed contract made by him with the testator of appellant C. P. Sprague, in relation to the mules in controversy. Sec. 2, Chap. 51, Revised Statutes; Langley v. Dodsworth, Ex'r, 81 Ill. 86; Boynton v. Phelps, 52 Ill. 219; Merrill v. Atkin, 59 Ill. 19; Trunkey et al. v. Hedstrom et al., 131 Ill. 204.

It is always competent to prove the admissions of an adverse party against himself, whether made under oath or otherwise, and the court erred in refusing to allow appellant to prove what the appellee had testified before the justice of the peace in relation to the contract under which he claimed to hold the mules. Chase v. Debolt, 7 Ill. (2 Gil.) 371; Brown v. Calumet River Ry. Co., 125 Ill. 600; Rogers et al. v. Suttle & Scroggin, 19 Ill. App. 163.

The contract under which appellee claims the right to the possession and use of the mules in controversy was not

to be performed within one year from the making thereof, and is within the statute of frauds and void. Sec. 1, Chap. 59, R. S.; Haynes v. Mason, 30 Ill. App. 85; Deyo v. Ferris, 22 Ill. App. 154; Comstock v. Ward, 22 Ill. 248; Curtis v. Safe, 35 Ill. 22; The Willam Butcher Steel Works v. Atkinson, 68 Ill. 421; Wheeler v. Frankenthal & Bro., 78 Ill. 124; McGinnes v. Fernandes, 126 Ill. 228.

The appellee was only entitled to introduce evidence as to, and recover, if at all, the damages he had sustained at the time this suit was commenced. Collins v. Montemy, 3 Brad. 182; Jones v. Dunton, 7 Brad. 580.

MOORE & WARNER, and BARCLAY & GAMBREL, attorneys for appellants.

APPELLEE'S BRIEF.

The section of the statute relating to the competency of witnesses, where persons defend as executors, etc., cited by appellants, has no application to this case. If appellant committed a tort, the fact that he was executor, or assumed to act as such in the commission of the wrong, is not of the slightest consequence.

The statute was intended to protect the estate from the assaults of strangers, and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or impair the estate, and does not relate to cases like the one at bar, where the estate itself is in no event to be reduced or impaired. Long v. Long, 19 Ill. App. 383, and authorities there cited.

A party to a suit can not, by merely calling himself executor, or attempting to defend or justify his tortious acts as such, deprive the opposite party of his rights as a witness in the case. Roberts et al. v. Pierce, Admr., 79 Ill. 378.

The admission of an incompetent witness to testify in a case, when the other proofs justify the judgment, affords no ground for a reversal. Trogden, Admx., v. Murphy, 85 Ill.

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119. See also Winslow v. People, use, etc., 117 Ill. 152; L. E. & W. Ry. Co. v. Zaffinger, 107 Ill. 199; Hill v. Parsons, 110 Ill. 107; N. W. R. R. Co. v. Hack, 66 Ill. 238; Bonnett, v. Glattfeldt, 130 Ill. 166; Moore's Civil Justice, Sec. 1038.

Appellee had a right to recover in the suit, and the measure of his damages was at least the value of his special property in the goods. Broadwell v. Paradise, 81 Ill. 474; Moore's Civil Justice, Sec. 1268.

WILLIAM BOOTH and R. A. LEMON, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

About the 20th of August, 1890, Charles L. Sprague agreed with appellee to let him have the use of a pair of mules for a year, in consideration of his undertaking to break them. At that time appellee proposed to take them, but Sprague thought they wouldn't lead well behind his buggy and suggested that he come back for them on the following Saturday, which was done. Shortly afterward Sprague died, and appellant, C. P. Sprague, his son, was his executor, who, as such, advertised the sale of personal property belonging to the estate to be made on May 22, 1891. On the morning of that day he caused the mules to be taken by his co-appellant from appellee's place, against his will and protest, to the place of sale, where they were by him sold and delivered to a Mr. Armstrong. Three days afterward this action was brought before a justice of the peace, and, on appeal, tried by the court below without a jury. Judgment was entered for plaintiff on the finding for \$80 damages. The agreement, whatever it was, between appellee and the deceased, was verbal; appellee was allowed to state what the deceased said as constituting the agreement. Appellants insist that this was incompetent, because, though the action is against them personally and for alleged tort, Sprague defends on the ground of his authority and right as executor, and his co-defendant as his servant. We deem it unnecessary to decide this question, since Frances Sprague and Mary

Coons, a daughter of deceased, testified that he told them respectively, just after appellee had been there, that he was to have them for a year—which was all that appellee stated, and there was no contradiction on that point.

Again, it is said that, as it appears appellee did not get possession of the mules for several days after the agreement was made, and it was not to be performed within one year, it was therefore void under the statute of frauds. But as the court held with appellants on the law, he must have found against them upon the question of fact. There was no evidence tending to show that, by the terms of the agreement, the year was to commence at a future day, but rather that it commenced presently; for appellee intended and proposed to take them immediately, and his right to do so under the agreement was not denied.

Defendants recalled one of their own witnesses and asked if he heard the plaintiff, on the trial before the justice, state the agreement with deceased, and having received an affirmative answer, further asked him to “tell it as he told it there,” to which an objection for immateriality was sustained. Counsel did not suggest that the answer would tend to show a statement at all different from the one he made on this trial, nor what it would be or show. His statement on this trial had been corroborated by two witnesses. If that made on a former trial was substantially the same—and there is no proof or presumption that it was not—its exclusion could do the defendants no harm.

Plaintiff was allowed, over objection, to introduce evidence to show how much the use of the mules from May 22d to August 30th, would be reasonably worth. It was and is insisted that he should have been confined to the value of their use until May 25th, the commencement of the suit. We think not. When the suit was commenced he had been deprived by the act of appellants of their use for the entire residue of the term.

This value was variously stated by the witnesses—being from seventy-five cents to \$2.50 per day, and would have warranted the finding of a larger amount than was allowed,

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without including the halters, for which plaintiff was allowed to state, over objection, that he paid \$3.

On the whole, we think the conduct of the appellants was rather high-handed, and no injustice has been done by the judgment. The errors assigned, about which we might have doubts, we consider immaterial, and the defense without merit. Judgment affirmed.

Bradford, Administrator, etc..v. Bennett et al.

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158 271

1. *Survivorship in Personal Property*.—The common law rule of survivorship in respect to personal property jointly owned, has been abolished in this State by statutory provisions, in force since January 13, 1821.

2. *Decrees—Appeal by a Portion of the Parties*.—Where a part of the parties affected by a decree in equity appealed and the same was reversed, *it was held*, that the entire decree was reversed, although some of the parties did not appeal.

Memorandum.—Suit in equity. Appeal from the Circuit Court of Sangamon County; the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1891, and affirmed. Opinion filed October 31, 1892.

STATEMENT OF THE CASE BY THE COURT.

This was a bill in equity, filed on the 4th day of August, 1887, by Mary E. Bennett and Annie E. Bennett, two of the appellees, by Mary E. Bennett, their mother and next friend, wherein John S. Bradford, administrator of the estate of Samuel H. Treat, deceased, George W. Murray, administrator of the estate of Sarah M. Bennett, deceased, and Charles W. Bennett were made parties defendant. Subsequently Chesley M. Bennett, by Mary E. Bennett, his next friend, became a party complainant.

The bill alleged: That on the day of A. D. 1869, Sarah M. Bennett, the mother of complainant's father, died, leaving a last will and testament, which is set out in the

bill. By the first, second and third items it is provided as follows:

“First. I give and bequeath to my executors the sum of ten thousand dollars on the trust following, the income to be paid to my son, Charles W. Bennett, during his natural life; on his death, the said sum of ten thousand dollars to be equally divided among his children; and in case of his decease without issue, the said sum of ten thousand dollars to be equally divided between his aunts, Jane D. Hunt and Annie E. Treat.”

“Second. All the rest of my estate, real and personal, I give and bequeath to my said son, Charles W. Bennett.”

“Third. I nominate and appoint Samuel H. Treat sole executor of my estate.”

That after the death of the said Sarah M. Bennett, Samuel H. Treat, the executor therein named, retained the said will in his custody, and never presented the same for probate, but took into his custody all the property of Sarah M. Bennett, consisting of money and promissory notes bearing interest at the rate of ten per cent per annum, said notes amounting, at the date of the death of Sarah M. Bennett, to about twenty thousand dollars. That Samuel H. Treat retained control of all the moneys and property of the said Sarah M. Bennett, deceased, until the 27th of March, 1887, when he died intestate; that on the 30th of March, 1887, John S. Bradford was appointed his administrator by the Probate Court of Sangamon County, Illinois. That after the death of Samuel H. Treat, the will of Sarah M. Bennett was found among his papers, and was admitted to probate in the County Court of Sangamon County on the 7th day of July, 1887, and George W. Murray was appointed administrator of the estate of Sarah M. Bennett with the will annexed, and that since said appointment said Murray, as such administrator, has filed a claim in the said Probate Court against the estate of the said Samuel H. Treat for the sum of ten thousand dollars, the amount which will be due complainants on the death of their father, Charles W. Bennett, according to the terms of the will of

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the said Sarah M. Bennett. That complainants are the only living children of Charles W. Bennett, who was the only child of Sarah M. Bennett. That by the will of Sarah M. Bennett, ten thousand dollars was set apart and placed in the hands of her executor, the said Samuel H. Treat, to be by him preserved as a trust fund and paid to the children of Charles W. Bennett at his death; that the said Charles W. Bennett is still living, and while so living is entitled to the income from said trust fund. Prays that the court appoint a successor in trust of the said Treat, to receive the said sum of ten thousand dollars placed in the hands of the said Treat by said will, as a separate and sacred fund for the children of the said Charles W. Bennett, invest the same under the direction of the court, paying the income thereof to the said Charles W. Bennett during his life, and the principal of the same to the surviving children of the said Charles W. Bennett at his death, and for process and answer, but not under oath.

Answer of Charles W. Bennett: Admits death of Sarah M. Bennett, his mother, as alleged in bill, leaving will as therein described, which will was not probated until as alleged in bill; also that complainants are his children, and that they are entitled at his death to the sum of ten thousand dollars from the trust fund placed in the custody of the said Samuel H. Treat under the will of Sarah M. Bennett; that George W. Murray is the administrator with the will annexed of the estate of Sarah M. Bennett; and that the said Samuel H. Treat never offered for probate, the said will, but acted under and by virtue of its terms so far as to pay this respondent a portion of the amount placed in his hands by the said Sarah M. Bennett; that all other allegations of the bill are true.

Answer of John S. Bradford, administrator of the estate of Samuel H. Treat, admits death of Sarah M. Bennett, about October 30, 1869; that she left will as set out in bill, and that same was found at residence of Samuel H. Treat after his death; but denies that same was placed in custody of Treat for safe keeping by testatrix, or that he had

knowledge of its existence; denies that Samuel H. Treat took possession of any property belonging to Sarah M. Bennett, at or since her death, and that in truth she was not the owner of any property, real or personal, in her own right, at time of her death; that long prior to death of Sarah M. Bennett, certain notes were placed in the hands of Samuel H. Treat by the husband of Sarah M. Bennett, or some person unknown to respondent, to be held in trust for the benefit of Sarah M. Bennett and Charles W. Bennett during their joint lives, and at the death of Sarah M. Bennett the fund to be paid to Charles W. Bennett; that said Treat took charge and control of said assets, loaned and re-loaned money, and received and paid for the benefit of his *cestuis que trust*, before and since the death of Sarah M. Bennett, and that no part of said funds in his hands was under the control of Sarah M. Bennett, or subject to her disposal by will or otherwise.

Respondent admits that on proper accounting there is a small amount due Charles W. Bennett, but denies there is anything due complainants; admits death of Samuel H. Treat on March 27, 1887, and that respondent was on March 30, 1887, appointed administrator; that George W. Murray has been appointed by the same court administrator with the will annexed of the estate of Sarah M. Bennett, and that he has filed a claim as such administrator against the estate of Samuel H. Treat for \$10,000, and denies all other allegations.

Cross-bill of Charles W. Bennett, making all other parties to original bill defendants; alleging the death of Sarah M. Bennett, and that she left a will, as set out in the original bill; that will was left in custody of Samuel H. Treat, who failed to present the same for probate, and the same was not probated until after his death; that Treat took possession of all the property of Sarah M. Bennett, deceased, and retained the same in his possession without probating the will or obtaining any authority to hold the same, and did use, retain and possess all of said property and the proceeds thereof as his own property, until the date of his death;

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that the said Samuel H. Treat did receive and so appropriate of the property of the said Sarah M. Bennett, at the time of her death, the following:

Money on hand.....	\$ 914.61
Notes and mortgages.....	19,386.54
Notes.....	3,000.00

Total.....	\$23,301.15
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That all of said notes bore ten per cent interest, and that said Treat placed said \$914.61 at interest at the same rate, and received the income thereof from the death of Sarah M. Bennett until his death; that the interest on said sums would amount to \$2,330.11 per annum, all of which, according to the terms of the will, should have been paid to complainant by said Treat, as well as the sum of \$13,301.15, being the amount placed in his hands, under the terms of the will, in excess of the sum of \$10,000 to be by him held in trust for the children of the complainant.

That about the month of May, 1874, the said Samuel H. Treat rendered complainant an account which showed there was in his hands belonging to said estate in secured notes:

A principal sum of.....	\$17,463.56
Cash on hand.....	2,335.11

Making a total of.....	\$19,798.67
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besides the interest then due and payable on the same; that said statement includes all amounts paid by Samuel H. Treat to complainant and every other person to whom the estate of Sarah M. Bennett was indebted, and also stated the balance in his hands belonging to said estate on the first day of May, 1874, less the interest due and unpaid upon the notes and securities he held, which unpaid interest complainant believes was in the neighborhood of \$5,000.

That complainant has received many sums of money taken from the income of the said fund since the first day of May, 1874, the total amount of which he has no means of accurately ascertaining, but that an account of such payments was kept by the said Samuel H. Treat, and is now in the

possession of said administrator of his estate; but he distinctly denies that he has ever received any portion of the principal of the estate of the said Sarah M. Bennett, and, as he believes, but a portion of the income thereof due him.

That Samuel H. Treat took and held the moneys and securities belonging to the estate of Sarah M. Bennett, without having probated her will, or given bond and security, and he thereby became executor *de son tort* of said estate, and as such the administrator of his estate should be required to make an account, etc.; that he has never had any settlement or accounting, etc. The prayer of the cross-bill is, that the administrator of the estate of Samuel H. Treat pay complainant in cross-bill the sum found to be due to him on an accounting, as a sixth-class claim, and for general relief.

Answer of Geo. W. Murray, administrator of the estate of Sarah M. Bennett, to original bill, filed May 7, 1888, denying all allegations affecting the estate of Sarah M. Bennett.

Answer of John S. Bradford, administrator of the estate of Samuel H. Treat, deceased, to the cross-bill of Charles W. Bennett, filed December. Admits death of Sarah M. Bennett and sets up substantially the same facts as in his answer to original bill. Admits that Charles W. Bennett is entitled to an account and is ready and willing to aid in that direction so far as in his power. Defendant adopts as his answer to cross-bill, his answer to the original bill, in so far as the statement of assets and accounts is concerned and in so far as otherwise applicable, and denies all other allegations in cross-bill.

Mary E. Bennett and Annie E. Bennett, infants, by W. E. Shutt, their guardian *ad litem*, filed an answer to the cross-bill of Charles W. Bennett.

On May 7, 1888, the court entered a decree finding that the funds held by said Treat belonged jointly to Sarah M. and Charles W. Bennett, and that on the death of said Sarah the said Charles W., as surviving owner, took the entire estate, and that nothing passed by the will; that at the death of the said Samuel H. Treat no final account had been rendered

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by him to the said Charles W. Bennett; that upon stating an account between said Bradford, administrator, etc., and said Charles W. Bennett, there is now due to the said Charles W. Bennett from the estate of the said Samuel H. Treat the sum of \$3,500; the court therefore ordered, adjudged and decreed that said administrator pay to Charles W. Bennett the sum of \$3,500 out of any money in his hands belonging to the estate, but not in due course of the administration, and when such sum shall be paid, the estate of the said Samuel H. Treat shall thereby be released and absolved from any and every claim of whatsoever kind of any nature, on the part of any of the parties to this suit, growing out of the administration of the said trust estate of Sarah M. and Charles W. Bennett by the said Samuel H. Treat during his life, or by the said Bradford, administrator of his estate, since his death, and that the administrator pay the costs.

On July 28, 1890, was filed in said Circuit Court final order of the Supreme Court of the State of Illinois reversing said decree and remanding the cause to the Circuit Court for further proceedings. In this final order it appears that only Mary E. Bennett and Annie E. Bennett were plaintiffs in error.

On the 6th of April, 1891, John S. Bradford, administrator of the estate of Samuel H. Treat, deceased, filed an amended answer to the complainant's bill, setting up the former decree, and that he paid said sum of \$3,500 to said Charles W. Bennett, and that said Charles W. Bennett did not appeal from said decree, and that the same is in full force and unreversed as to him.

The cause was duly heard and a decree was rendered finding that said Samuel H. Treat died intestate, as alleged, and that the County Court appointed said John S. Bradford administrator of the estate of said Treat; that at the time of his death the said Samuel H. Treat was a trustee, as such holding and managing a fund of \$10,000 for the use of Charles W. Bennett, during his lifetime, and to go to his children at his death; that said sum of \$10,000 was so held and managed by said Treat under the will of Sarah M. Bennett.

That in and by said will the said Treat was named and designated as the sole executor thereof; that said Sarah M. Bennett died on or about the 30th day of October, 1869, testate; that said Treat, from the time of the death of said Sarah M. Bennett till the time of his death as aforesaid, held in his custody the said will of Sarah M. Bennett, and also took and held her estate; and that after the death of said Treat, the said will of Sarah M. Bennett was duly admitted to probate and record in the County Court of Sangamon County, Illinois; that Charles W. Bennett still lives and his only children are Mary E. Bennett, Annie E. Bennett and Chesley M. Bennett, the latter having been born since the beginning of this suit and having been made a party thereto as complainant on motion of complainants; that said trust fund so held by said Treat at his death passed into the hands of said Bradford as administrator as aforesaid, but was not subject to administration by said Bradford as part of the estate of said Treat.

It was therefore ordered, adjudged and decreed by the court, that said John S. Bradford, administrator as aforesaid, pay over to Samuel Haines, trustee, the said sum of ten thousand dollars, to be by the said Haines held and managed as provided for in and by the will of said Sarah M. Bennett.

That said Samuel Haines hold and manage said trust fund of ten thousand dollars, as the successor of said Treat; and that said Samuel Haines, before entering upon his duties as such trustee, shall give and enter into a bond in the penal sum of fifteen thousand dollars, with sureties to be approved by the court, conditioned to faithfully hold and manage said trust fund as above provided and set forth, and to account for same whenever required by the court, etc., etc.

The said John S. Bradford appealed from said decree and having died since the case reached this court, Charles E. Hay, administrator *de bonis non*, appeared and became a party in his stead.

BROWN, WHEELER & BROWN, solicitors for appellant.

GROSS & BROADWELL, solicitors for appellees.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

The most important question arising in the case is involved in the point made last in the brief of appellant, *i. e.*, whether the common law rule of survivorship in respect to personal property jointly owned prevails in this State?

If this question can be answered affirmatively the complainants in the bill had no standing in court.

We are persuaded the rule has been abolished by statutory provisions in force since January 13, 1821.

Sections 1, 2, 3 and 4 of the act then passed, entitled "An Act concerning partitions and joint rights and obligations," are as follows:

"Section 1. That all joint tenants or tenants in common, who now are, or hereafter shall be possessed of any estate of inheritance, or estates less than those of inheritance, either in their own rights, or in the rights of their wives, may be compelled to make partition between them of such lands, tenements or hereditaments, as they now hold, or hereafter shall hold, as joint tenants or tenants in common. *Provided, however,* that no such partition, between joint tenants or tenants in common, who hold or shall hold, estates for life or years, with others holding equal or greater estate, shall prejudice any entitled to the reversion or remainder, after the death of the tenants for life, or after the expiration of the years.

"Section 2. That if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivor or survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenants had been tenants in common.

"Section 3. That for assuming and exercising exclusive ownership over, or taking away, destroying, lessening in value, or otherwise injuring or abusing the thing held in joint tenancy, tenancy in common, or parcenary, the party aggrieved shall have his action of trespass or trover for the injury, in the same way as if such joint tenancy, etc., did not exist.

“Section 4. That all joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants.”

In the revision of 1833, p. 473, the same provisions are found under the same title, but in the revision of 1845, section 1 was transferred in substance to chapter 79, entitled, “*Partitions*” while sections 2, 3 and 4 became sections 1, 2 and 3 of chapter 56, entitled, “*joint rights and obligations*,” and so the provisions may be found in the revision of 1874, chapters 76 and 106. In the revision of 1845 a slight change was made in section 3, the words “any property” having been substituted for the words “the thing.”

It seems reasonably clear that section 2 of the act of 1821 being section 1 of the present chapter 76, is broad enough to include personal as well as real property, and that some of the phraseology, to wit, that referring to transmissibility to executors and administrators, is especially applicable to personal estate.

Section 3 of the original act, section 2 of chapter 76, manifestly includes a reference to personal property held in joint ownership and has been so construed by our Supreme Court. *Benjamin v. Stremple*, 13 Ill. 466; *Boyle v. Levings*, 28 Ill. 314; *German National Bank v. Meadowcroft*, 95 Ill. 124.

Regarding these sections together, as we necessarily must, strengthens the position of the appellee. After a full consideration of all arguments adduced by counsel we are satisfied with the conclusion reached by the Circuit Court on this branch of the case.

Returning now to the points made by appellant in the order as they appear in the brief, it is urged first that the relief is not within the jurisdiction of a court of equity. This objection does not appear to have been pressed in the court below, and the position now taken that an adequate remedy at law is afforded by the statute in reference to administrations should not be presented for the first time in this court. *Chicago Theo. Sem. v. Gage*, 103 Ill. 175. But we think the subject-matter and the conditions are such that

the County Court could not adequately deal with the rights of the parties and that a resort to chancery was proper, and indeed, necessary.

The next point, that necessary parties were omitted, must also be overruled.

There was no attempt to administer the estate generally, but merely to withdraw from the hands of the administrator a certain fund, as not belonging to the estate, and to place it in the hands of a trustee to be managed according to certain directions contained in the will of Mrs. Bennett.

In this connection may be noticed the point fifthly made, that the decree is erroneous in charging the estate of Samuel H. Treat with any act or default of his as executor or trustee under said will. It is true the executor named in the will did not present the same for probate and did not formally act as executor, but he assumed to manage, handle and control the property affected by the will and there was evidence tending to show that he recognized it as the property of the testatrix and as subject to the testamentary provisions. We are unable to see any force in this objection.

A further point is made that there has been no such identification of the trust fund, or of its proceeds, as will enable the court to lay hold of any property in the hands of the administrator as impressed with the trust. A majority of the court are of opinion this point is not well taken, and that the decree in this respect is sufficiently supported by the proof.

The statute provides that where a decedent has received money in trust for any purpose his administrator shall pay the same out as a sixth-class claim. R. S., Ch. 3, Sec. 70. The claim thus arising takes precedence of other debts and demands of a general nature which constitute claims of the seventh class.

On examining the report of the administrator which appears in the abstract it is quite evident that there were ample funds for the payment of all claims of the first, second, third, fourth and fifth classes. It follows that even though the identification of the funds or the proceeds thereof may

not be what the law would require, yet by virtue of this provision of the statute the money in question must be paid out in preference to the claims of ordinary creditors, and that no error was committed in this respect, since the rule of the statute has been substantially carried out.

Finally, it is objected the decree is erroneous, in providing that the money should be managed by the trustee, as provided in the will, because it thereby gives Charles M. Bennett the income of the money during his lifetime, when by the former decree in the case it was found that though he was entitled to all the money remaining in the hands of said Treat, the balance so due him was but \$3,500, for which a decree was rendered, and that the money had been paid him.

It is suggested, therefore, that in making the further provision for him as was done in this decree the court erred; and it is argued that the income of the \$10,000 should be used to reimburse the estate of Judge Treat the amount thus paid to said Bennett in excess of what should have been paid to him. It appears that the former decree was in fact rendered by consent, though the decree upon its face does not so show, and that C. W. Bennett did not appeal from it.

We are inclined to hold that the entire decree was reversed, although C. W. Bennett did not appeal. Hence, it would seem that the matters arising upon the cross-bill should have been examined. It will be noticed that the allegations of the cross-bill as well as of Bennett's answer are consistent with the theory of the original bill.

The cross-bill merely seeks an accounting as to the balance due C. W. Bennett as owner of one half of the money originally placed in the hands of Judge Treat and as residuary legatee of his mother. The first decree, however, found that he took the whole as survivor, and that there was due him on that account \$3,500.

This amount was at once paid him, and when the decree was reversed it may be conceded that he should account for it to the administrator.

Now the question is, in what way may the administrator have relief. Probably he could recover the amount in an action at law, but he might also have relief in this proceeding, the parties all being before the court.

In order to have such relief it would be necessary that the court should be properly called upon at the instance of the administrator.

It seems that the issue made up on the cross-bill of C. W. Bennett was not presented to the court on the last hearing, and there appears to have been no examination of the question as to the amount due him from the estate. This branch of the case was in effect ignored or passed over. The record shows that the cause was submitted upon the issues made on the original bill and the answers and the replications thereto. It is not indispensable that the issue made upon the cross-bill should be heard along with that made upon the original bill. *Myers v. Manny*, 63 Ill. 211.

The amended answer of Bradford sets up the former decree, that he paid said sum of \$3,500 to C. W. Bennett, that said Bennett did not appeal therefrom, and that the same is in full force and unreversed as to him.

It would appear, therefore, that the administrator was disposed to regard the former decree as a finality, so far as C. W. Bennett was concerned, and that no effort was made to interpose it as a bar to the relief sought by the complaints.

Assuming that that decree was reversed and that the money paid thereunder should be accounted for by C. W. Bennett, and that he should be required to refund it, or that his income on the \$10,000 should be used to reimburse the estate for the excess received by him, the question is whether, upon the pleadings and evidence, the present decree is erroneous because containing no such provision. In the first place, it is not apparent what, if any, excess Bennett really has received, assuming that he took nothing as survivor; and in the second place, we are inclined to think that, under the pleadings as made up, the administrator should not now be heard to make the point.

By his amended answer he affirmed the binding force of the former decree as to C. W. Bennett.

That decree, according to the pleadings as then made up, could not affect the rights of the complainants, though upon its face and according to its findings, it did deny any interest to them in the estate. Nor did the administrator ask the court for any relief as against C. W. Bennett in respect to that money. Such relief might have been sought by cross-bill; but none was filed, nor did the answer set up any desire for such relief. Indeed, the whole issue submitted to the court was upon the main question presented by the original bill and the answers, as to the rights of complainants.

In view of the situation thus presented, we are of opinion that the decree should not be reversed for this cause.

No other objections are urged, and failing to discover any error of substance in the decree, we must affirm it.

Teeter et al. v. Poe.

1. *Continuance—Want of Copy of Instrument Sued on.*—A motion for a continuance upon the ground that no copy of the instrument sued on is filed with the declaration, comes too late after pleas filed in bar.

2. *Variance—Copy Filed and Note Offered in Evidence.*—Where the note offered in evidence agreed with the copy filed with the declaration in date, names of parties, amount, time of maturity and rate of interest in substance and legal effect, *it was held* that such verbal differences were too immaterial to support an objection to its admission as evidence on the ground of a variance.

3. *Promissory Notes—Possession by Maker—Presumption of Payment.*—Possession unexplained by the maker of a promissory note is *prima facie* evidence of payment; but when the evidence shows the circumstances, manner and means of obtaining the possession, the presumption or inference of payment, if any, must come from these and not from the mere fact of possession. If they show it was wrongfully delivered by a party to whom the payee had intrusted it for another and different purpose, such possession is no evidence of payment.

4. *Instruction Immaterial Error.*—In an action upon a promissory note, the court instructed the jury, for the plaintiff, that if they believed from the evidence that plaintiff was the grandmother of defendant, Charles Teeter's wife, and resided with defendant, Charles Teeter, and was

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treated as a member of the family, then they must be satisfied from the evidence that at the time plaintiff so resided with the said defendant, it was expected by both parties that plaintiff should pay her board, or that the circumstances under which the board was furnished were such that such expectation was reasonable and natural, or that there was an expressed contract on the part of plaintiff to pay her board, and if the jury are not so satisfied from the evidence, the defendants should be allowed nothing by way of set-off. *It was held* that the instruction called for a higher degree of proof on the part of the defendants than the law required, and had the evidence been at all close upon the question of set-off, the court might have felt constrained to hold the giving of the instruction material error, and sufficient ground for reversing the case.

Memorandum.—Action on a promissory note. Appeal from a judgment in favor of appellee for \$460, rendered by the Circuit Court of McLean County; the Hon. CHARLES STARR, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1891, and affirmed. Opinion filed October 31, 1892.

APPELLEE'S STATEMENT OF THE CASE.

The appellee, some ten or twelve years ago, was the owner of forty acres of land, her homestead, in McLean county, worth at that time some \$2,000; she was living on the place, with her grand-daughter, in comparative comfort. This property was all that she had to support herself and her grand-daughter. Charles Teeter, one of the appellants, at that time a young man, and a son of the other appellant, became acquainted with appellee's grand-daughter and solicited her hand, and was accepted in marriage. After the marriage she broke up housekeeping, moved her household furniture and such things as she had to the home of Teeter, and continued to live with him as one of the family until about a year ago, when his wife died. In the meantime Teeter had removed from Illinois, first to Kansas and afterward to Nebraska, and succeeded in running through all of the property that appellee had, he having in the meantime induced her to sell her homestead and let him have the money.

When this suit was instituted appellee had the note in suit, which was secured by the signature of Benjamin Teeter, and two other notes, which were offered in evidence, and were signed by Charles Teeter alone. These two latter notes

were worthless, although a suit had been instituted upon them in the court below. This suit, and the suit against Charles Teeter, stood side by side upon the docket, this suit being the first on the call. The same defense was interposed in both suits, namely, charge against appellee for board during the time she lived in the Teeter family, and payment. The charge against appellee for board, according to the bill of particulars, was some \$2,000 in each case, the entire defense having been put in against this particular note.

KERRICK, LUCAS & SPENCER, attorneys for appellants.

JOHN E. POLLOCK and A. J. BARR, attorneys for appellee.

OPINION OF THE COURT, *the Honorable George W. Pleasants, Judge.*

The original declaration in this case consisted of a special count on a promissory note and the common counts, with which was filed the following as a copy of the instrument sued on :

“ DOWNS, ILL., August 27, 1885.

On the 10th day of June, 1886, we promise to pay Isabella A. Poe or order five hundred dollars with interest at the rate of eight per cent per annum from date.

CHARLES TEETER,
BENJAMIN TEETER.”

The note intended was then in possession of the defendant, Benjamin Teeter. Plaintiff obtained a rule on him to produce it, and on its production, by leave of court, filed an additional count in which it was set out *in haec verba*, as follows :

“ DOWNS, August 27, 1885.

On the 10th day of June, 1886, we or either of us agree to pay to Mrs. Isabella A. Poe the sum of five hundred dollars and such interest as she may be liable to pay on a loan made by her of five hundred dollars for us. This note is given in lieu of former note given to her by us, and by her lost. And this note is in full discharge of that note, and the said Isabella A. Poe, by her acceptance of this note, guarantees that the former note, which is said to have been

lost or stolen, was not and has not been by her assigned or in any manner transferred to any person or persons.

CHARLES TEETER,
BENJAMIN TEETER."

On the same day, October 5, 1891, the following steps were taken in the cause, which are set out in the abstract in the following order:

- (1.) Plaintiff filed the additional count referred to.
- (2.) Defendants filed, in addition to the plea of payment previously filed, two others in bar—one, that after the making of the note sued on, the plaintiff accepted another in full payment and discharge thereof; and the other, that Benjamin Teeter was only a surety on the note, and plaintiff knew it, and that she is indebted to Charles for goods, chattels, board, lodging, etc. (under the common counts).
- (3.) Plaintiff *not pros'd* the first count of her declaration.
- (4.) Defendants entered a motion for continuance, on the ground that a copy of the instrument sued on was not filed with the declaration ten days before the term; which was overruled. The trial was begun October 13, 1891, and resulted in a verdict for plaintiff for \$460. A motion for a new trial was denied, and judgment entered on the verdict.

It appears that in April, 1881, appellant, Charles Teeter, married a grand-daughter of appellee, then living with her, as she had been from early childhood, on a forty-acre tract which she owned near Leroy. He rented a small farm in the neighborhood, and upon the marriage they moved on it. Appellee went with them, taking along some household furniture. She was then about seventy-three years of age, and from that time until the death of Mrs. Teeter, in the spring of 1891, she continued to live with the family and to appear as a member of it. During that time they moved to and resided for awhile in De Witt County, Ill., then again in McLean, then in Kansas, then in Nebraska, and finally returned to McLean, in February, 1891. Teeter was a farmer, with but little means and an increasing family. His wife bore him five children, of whom four survived her. With

the duties, cares and disabilities to which she was necessarily subjected by these conditions, it is not to be believed, without clear and strong evidence, that her grandmother was either a boarder or a servant for wages in that family. No such evidence is found in the record.

Shortly after they left the farm near Leroy, appellee mortgaged her land for money to loan and which she did loan to Charles Teeter, taking therefor a note signed by his father as surety for him, which was lost, and in lieu of which the one in suit was given. Her mortgage debt bore interest at eight per cent. She afterward sold her equity of redemption, and loaned most of the proceeds to him, amounting together to \$900, which she still holds, taking his note therefor.

It is said that the note here sued on was paid in cash by Benjamin Teeter. Upon that question the evidence was in substance as follows: In the fall of 1890, his crops having failed and his stock and implements being under chattel mortgage, Charles Teeter came to McLean County in an effort to raise means with which to pay his debts and get his family back. Appellee had previously sent this note to an attorney in Bloomington for collection. She also had some other small claims due from parties in McLean. While Charles was so there she sent him, unsolicited, the following: "Benedict, Neb., November 11, 1890. I hereby authorize Charles Teeter to collect my notes and accounts due me. Isabella A. Poe." Upon this as his authority he obtained the note from the attorney. He made no attempt to collect it of his father, but took it back to Nebraska, and retained it until he delivered it to his brother David as hereinafter stated, though he says she might have had it at any time if she had asked for it. In February, 1891, Benjamin Teeter sent David to Nebraska with something over \$500 with instructions, as he says, to lift the note and not to pay out a dollar until he got it. The amount then due upon it was over \$700, and how or why he expected to get it for less he did not state. David went to Nebraska, and without one word from appellee, except as represented

by Charles, paid out all the money on Charles' mortgage debts and for transportation of the family to McLean, and thereupon Charles delivered to him the note, which he on his return delivered to his father without any statement of the manner in which or the means by which he got it. Charles testified that she consented to the arrangement he made with David before any of the money was paid and to his delivery of the note at the time he delivered it. David testified that she and Charles' wife were in the room with them when it was delivered; that Charles said something to her about the note, but did not remember what it was, or that she said anything. He did not testify that she saw him deliver it. Appellee positively denied that she told Charles to deliver it, or knew that he did deliver it to David.

She was about eighty-three years of age at that time, and this note represented all the means she had—these notes against Charles, which were produced in evidence, being understood to be worthless. It is not pretended that a dollar of the money in David's hands was paid to her. There was a plea of accord and satisfaction interposed. Why the jury found for her and yet found only \$460, we are at a loss to understand; but she does not complain of it.

The alleged errors are the overruling of the motion for continuance, the giving of the second instruction for the plaintiff, and the refusal of several asked by defendants.

We do not understand the motion was based on the idea that the note intended was the one set out in the additional count, and that there was no declaration on that note nor any copy of it, filed ten days before the term; but on the fact that what was filed with the original declaration as a copy was not a true copy of the one actually sued on. The language of the brief is: "It appears by the foregoing statement, and we think, that the copy of the note filed with the original declaration is not a copy of the note sued on. If that is so, it was error to overrule the motion," etc. This could have so appeared to the court when the motion was made, only upon the assumption that the note intended

by the first count was the one referred to in the additional count as that which had been lost, and in lieu of which, the one therein set forth had been accepted. But the court was not bound to assume it, nor could it properly do so unless the first count had then been *nol pros'd*. If the proceedings taken on October 5th were in the order set forth in the abstract, it had then been *nol pros'd*. But the same order showed that after the additional count was filed, defendants filed additional pleas in bar, and a motion for continuance on the ground stated is not in apt time after pleading in bar. *McCarthy v. Mooney*, 41 Ill. 300. Moreover, the note as set out in the additional count was substantially and almost literally the same as the copy filed with the first, with only the addition of a recital of fact and a guarantee of the payee which did not affect the obligation of the makers. In date, names of parties, amount, time of maturity and rate of interest—in substance and legal effect—the copy and note sued on were precisely the same, and the verbal differences were too immaterial to support an objection to its admission in evidence on the ground of variance. The copy fully advised defendants of the instrument relied on and intended to be proved, and the error, if it was an error, resulted in no surprise, embarrassment or injury to them.

Two of the refused instructions were to the effect that possession of the note by the maker constituted *prima facie* evidence of its payment. This is true of possession unexplained.

But where the evidence shows the circumstances, manner and means of obtaining it, the presumption or inference of payment, if any, must come from them and not from the mere fact of possession. If they show it was wrongfully delivered by a party to whom the payee had intrusted it for another and different purpose, such possession is no evidence of payment. And where the evidence of these circumstances is conflicting, the inference as to payment must be drawn from it alone, according to the preponderance, against the maker alleging payment, if the preponderance is not in his favor. In this case there was no evidence of payment.

We understand it to be still the law that payment of a debt of \$700 can not be made with \$500. The attempt was to show, not payment, but an accord and satisfaction, which was not pleaded; and as to that, the evidence was conflicting. We think these instructions were inapplicable to the case and misleading, and so were properly refused.

Two others were asked upon the hypothesis that plaintiff, at her request, lived and boarded with the defendant, Charles Teeter. Finding in the abstract no evidence of any such request, we think these also were rightly refused.

By the second instruction given for plaintiff, the jury were told that upon the hypothesis therein stated, they should allow the defendants nothing by way of set-off unless they were "satisfied from the evidence"—that both the parties expected plaintiff to pay for her board, or that under the circumstances such expectation was reasonable and natural, or that there was an express contract on her part to pay for it.

This called for a higher degree of proof on the part of defendants than the law required. *Goosch v. Tobias*, 29 App. 268, and cases there cited. Had the question as to the claim of set-off been at all close, upon the evidence, we might have felt constrained by these authorities to hold this error material and sufficient ground for reversing the judgment. But, as already intimated, we do not so regard it. Counsel are in error in supposing that the instruction applied also to the issue on the plea of payment, upon which it is claimed, with more plausibility, that the case was close, in the view which the court and counsel on both sides seem to have taken of payment, though we think there was none whatever tending to support a technical plea of payment.

The instruction as to the measure of proof required of defendants on that issue, which was the eighth and last, called for a preponderance only. If the jury, under proper instruction, had found that plaintiff was a boarder in the family, and chargeable as such, in our opinion it would have been the duty of the court to set it aside as clearly against the evidence, for the only evidence in support of it was the fact that

she lived with the family, while all the other circumstances—that she was the grandmother of Teeter's wife, and had filled the place of mother ever since the latter was seven years of age; that she lived with the family after her marriage because she asked her; that she sewed, washed, nursed, cared for the children as if they were her own, did general housework, moved with the family from place to place, and State to State, and this for ten years, without a charge or demand for board or for settlement, and for all the money Teeter got from her he gave his notes—sufficiently showed she was regarded by herself and by Teeter as a member of the family, not chargeable for board nor entitled to wages.

The only serious question of fact, and that not properly arising under the pleading, was whether she consented to the surrender or delivery of the note; and upon that the evidence was conflicting. We perceive no material error against appellants in the action of the court. Judgment affirmed.

Smith v. City of Cairo.

1. *Personal Injuries—Care and Diligence.*—A person afflicted with physical disabilities to a degree impairing his power of locomotion must be held to the duty of exercising a degree of care commensurate with and proportionate with her known infirmities and inabilities to observe obstacles in her path and pursue her way in safety.

2. *Diligence and Care Required of Persons with Defective Vision, etc.*—A person afflicted with defective vision and partially disabled in limb, and incumbered with a bundle in her arms, in passing over inequalities and uneven places in sidewalks, that other persons having normal powers of vision and normal strength, and suppleness of limb, would readily discern and without conscious effort pass over in perfect safety, will be held to exercise greater care and prudence to pass along and over such places in safety than is required of others having ordinary powers of sight and locomotion.

3. *Ordinary Care, etc.*—When a person, for reasons peculiar to herself, must be more prudent and use greater care than would be required of others, such greater care becomes only ordinary care in the meaning of the law.

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4. *Trials by Jury—Design and Purpose.*—The design and purpose of trials by jury is to secure a verdict according to the merits of the case under the law, and a judgment upon such a verdict will not be reversed even if slight errors were committed upon the trial in the admission of improper evidence or in giving or refusing of instructions.

Memorandum.—Action of case for personal injuries. Writ of error to the Circuit Court of Alexander County, to reverse a judgment of that court in favor of the defendant; the Hon. OLIVER A. HARKER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1891, and affirmed. Opinion filed January 5, 1893.

The opinion of the court states the case.

LANSDEN & LEEK, attorneys for plaintiff in error.

DEFENDANT'S BRIEF.

"A city is not required to have its sidewalks so constructed as to secure immunity from injury in using them, nor is it bound to employ the utmost care and exertion to that end. It, under the law, is only required to see that its sidewalks are reasonably safe, and reasonably safe for persons exercising ordinary care and caution in using them." *City of Chicago v. McGiven*, 78 Ill. 347.

GREEN & GILBERT, attorneys for defendant in error.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The stone pavement on the east side of Commercial avenue in the center of the block between Sixth and Eighth streets, immediately in front of the Sadler building, in Cairo, Illinois, was so constructed that it was higher than the pavement in front of the adjoining building. In the center of the walk the difference in height was two inches.

The plaintiff in error while attempting to pass along the walk at the point named, by reason; as she claims, of this unevenness in the walk, was tripped and thrown down, and the elbow joint of her right arm fractured. She instituted an action in case against the city to recover damages for the injury. Upon the trial before a jury the verdict and judg-

ment was against her, and this is a writ of error brought to obtain a reversal of the judgment.

It is assigned for error, that improper evidence was admitted in behalf of the city, and improper instructions given in the same behalf, and that proper instructions asked in her behalf were refused.

After a careful examination and consideration of the evidence produced by the plaintiff in error in support of her cause, regardless of that offered by the defendant in error, we have reached the conclusion that it fails to establish a right of recovery, and that the verdict of the jury was right, and should, and doubtless would have been the same, had the alleged errors not intervened.

If we are right in this it is not important to inquire as to the alleged admission of improper evidence in favor of the city, or as to the correctness of the rulings of the court in giving or refusing instructions.

It appears from the evidence on the part of the plaintiff as to the material facts in the case, that the plaintiff, at the time she received the fall complained of, was of the age of fifty-six years, and had for more than twenty-five years been a great sufferer from rheumatism. So severe had been this affliction that the knee joint of her right limb and the elbow of her right arm had become stiffened. Her own statement is that she was what "one would call a stiff-kneed person," and that she realized when walking that she had a stiffened limb.

She indicated to the jury the manner in which she would reach a higher from a lower step, and testified in relation thereto, from which it appeared that she would rise from a lower to a higher level by making the upward step with the left foot, and bringing the right limb up without bending the knee. Dr. Parker, who attended and dressed her injured arm, testified that the bone of the elbow of her right arm was fractured by the fall, but that the elbow joint had been destroyed by some previous inflammation, and that she explained to him it had been stiff for some years before, as the result of an attack of rheumatism. He further testified

that because of anchylosis of the joint, by which is meant a stiffness of the joint where the bone is partially destroyed, the fractured bones could not be reset. In addition to being disabled in arm and limb the plaintiff in error had another infirmity. Her vision was defective. She was near-sighted and in one eye affected with astigmatism. One of the effects of astigmatism upon the vision is to impair the power to discover that there is a difference in the elevation of adjoining level surfaces, and to accurately determine the height of the more elevated above that of the lower surface, if a difference in the elevation is observed. One so affected could not, with the same certainty as would others free from such an impairment of the vision, determine the height to which the foot should be lifted in order to reach a higher surface, even if conscious that an inequality existed.

The plaintiff in error had lived in Cairo for nearly twenty-five years. At the time of her injury she was, and for some time before had been, engaged in the business of canvassing the city, soliciting orders for and delivering medical band corsets, and other articles. She had frequently passed over the walk in question. She was carrying in her hand or arm a number of corsets at the time she received the fall. It appeared from the testimony of John B. Shea, one of her witnesses, that she approached the place of her injury with her head inclined upward and with evident lack of attention to things around her. Excluding all testimony offered by the city and accepting the case thus made and presented to the jury we think the verdict was right.

There was an inequality in the surface of the walk. It is not reasonable to require nor practicable for cities to have perfectly smooth and level walks. We do not wish to be understood to hold that, under no circumstances could the city be held liable for an injury occasioned by the unevenness of this walk; but in the case at bar we are of the opinion that no right of recovery existed in favor of the plaintiff in error. One affected with defective vision and partially disabled in limb and arm as she was, incumbered

with a bundle as she was, must be held to the duty of exercising a degree of care commensurate with and proportionate with her known infirmities and inability to observe and avoid obstacles in her path, and pursue her way in safety.

Inequalities and unevenness in a walk that others, having normal powers of vision and normal strength and suppleness of limb, would readily discern and without conscious effort pass over in perfect safety, would prove obstructions to her dragging footsteps and sources of possible danger.

Her defective vision in a measure deprived her of the power of knowing that elevations and depressions existed, and to a still further degree, of power of accurately determining the height to which the foot must be lifted to reach a higher level. The lifting of the foot in order to clear a slight elevation which to one of normal vision and limb is almost instinctive and automatic, was to her an act only to be performed by conscious mental and physical effort and exertion involving the exercise of thought, force and deliberation. Wherever walking, upon a pavement or elsewhere, greater care and prudence was necessary upon her part to pass along with safety, than others having ordinary powers of sight and locomotion were required to exercise.

When one, for reasons peculiar to herself, must be more prudent and use greater care than would be required of others, such greater care becomes only ordinary care in the meaning of the law. 16 Eng. and Am. Ency. page 400-401.

The evidence impresses us with the conviction that the injuries received by the plaintiff resulted chiefly from her physical disabilities and failure to exercise that degree of prudence and circumspection which, at the time in question, was in her case but ordinary care. Therefore the verdict of the jury was right upon the merits of the case as disclosed by the evidence produced in behalf of the plaintiff.

The design and purpose of trials before a jury is to secure a verdict according to the merits of the case under the law, and a judgment upon such a verdict will not be reversed even if errors were committed upon the trial in the

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admission of improper testimony, or in the giving or refusing of instructions. Newkirk v. Cone, 18 Ill. 449.

Substantial justice having been accomplished by the judgment, it must be and is affirmed.

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1. *Decree in Personam—What is, etc.*—In a suit to foreclose a mortgage brought against the administrator and the heirs of a deceased mortgagee, none of whom were personally liable for the payment of the mortgaged debt, the court found that there was due from the defendants to the complainants the sum of \$1,263.61 and \$50 attorney fees, and ordered that the defendants pay to complainants within ten days the said sum with lawful interest, etc., and that in default of such payment the mortgaged land, or so much thereof as might be necessary to satisfy the debt, etc., be sold at public vendue for cash, etc., and out of the proceeds to pay the costs and amount due the complainants. *It was held* that the decree was objectionable, in so far as it purports to find an amount due from the defendants to the complainants, and in ordering them to pay the same, but that it was not in this proceeding a decree *in personam*.

2. *Effect of the Mortgagee's Default at Common Law.*—Under the common law, a default in the performance of the conditions of a defeasance worked an absolute forfeiture of the estate, but in equity a mortgage was only regarded as a security for the indebtedness, and a right of redemption after a default was established.

3. *Judgment in Personam at Common Law.*—At common law a mortgagee might, if he desired a judgment *in personam*, bring his action at law upon the mortgage indebtedness.

4. *Jurisdiction of the Courts to Render Decrees in Personam in Foreclosure Suits.*—Our courts are without jurisdiction to render judgments or decrees for the payment of the mortgage indebtedness against defendants in foreclosure proceedings. Under the statute they can only render a decree for the balance of the amount that may be found to be remaining unpaid after the mortgaged premises have been sold and the proceeds applied under the decree.

Memorandum.—Writ of error to the Circuit Court of Scott County. Mortgage foreclosure in chancery; the Hon. GEORGE W. HERDMAN, Circuit Judge. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, A. D. 1892.

PLAINTIFFS' STATEMENT OF THE CASE.

On the first day of February, 1886, John Phelan borrowed \$1,200 from W. M. R. Vose and executed to him a bond, due five years after date, with interest at seven per cent, payable half-yearly, to secure payment of which he executed to complainant Kimball, as trustee, a deed of eighty acres of land in Scott County, subject to the condition of defeasance usual in such cases. Vose assigned this bond to "The Iona Savings Bank, of Tilton, New Hampshire." The bond having matured, suit for foreclosure was brought to the April term, 1891, of the Scott Circuit Court, by the bank and trustee, as complainants, against the plaintiffs in error. The bill alleges the making of the bond and mortgage; the maturing and non-payment of bond; that the maker had died, leaving surviving him Mary Phelan, his widow, and Annie, Mary, John, Edward, William and Sylvester Phelan, his children and only heirs at law; that defendant Annie is an infant; that defendant Lawless is administrator of the estate of said John Phelan, and defendant John Kelley claims some interest in the mortgaged land. H. B. Kelley was appointed guardian *ad litem* for said infant and filed a general answer. All other defendants were defaulted. The cause was referred to the master, who made a report, and on the first day of May, 1891, the decree complained of was rendered.

The opinion contains a copy of the decree.

PLAINTIFFS' BRIEF.

The bill charges and the decree finds that plaintiff in error Lawless was administrator of the mortgagee, and in that capacity alone he was made defendant. Yet there is a general money decree rendered against him. If any decree should have gone against him for money, it ought to have been one to be paid in due course of administration. *Hunter v. Bilyeu*, 39 Ill. 367, 370.

No one of the plaintiffs in error signed the mortgage bond, or assumed its payment in any manner whatever, and complainants were not entitled to a decree *in personam*

Phelan v. Iona Savings Bk.

against them. Snell v. Stanley, 58 Ill. 32; Rourke v. Coulton, 4 Brad. (Ill.) 260, 261; O'Brian v. Fry, 82 Ill. 275, 277; Cundiff v. Brokaw, 7 Brad. (Ill.) 147, 149; Warren v. McCarthy, 25 Ill. 95; Eames v. Turn Verein, 74 Ill. 56; Thomas v. Negus, 2 Gilm. (Ill.) 703, 704; Hatch v. Jacobson, 94 Ill. 584; Crosby v. Kiest, 135 Ill. 463; Sproule v. Samuel, 4 Scam. (Ill.) 139; Page v. People, 99 Ill. 425.

J. M. RIGGS and JAMES CALLANS, attorneys for plaintiffs in error.

DEFENDANTS' BRIEF.

The rule is, that a party will not be allowed to avail himself of error which does him no harm; and he may not assign such errors. Downey v. O'Donnell, 92 Ill. 559; Worden v. Crist, 106 Ill. 326; McCracken v. Droit, 108 Ill. 428; Grier v. Puterbaugh, 108 Ill. 602.

In Dunn v. Rogers, 43 Ill. 260, it is held that where a decree of foreclosure provides that a defendant, not liable therefor, pay the mortgage debt, yet that the error is cured by the sale of the mortgaged property in satisfaction of the debt. This discharges the debt and removes the liability; and such defendant can not be heard to say that he was erroneously decreed to pay the mortgage debt.

GROSS & BROADWELL, attorneys for defendants in error.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This is a writ of error brought to reverse a decree of foreclosure rendered in the Circuit Court of Scott County, to which the plaintiffs in error were parties defendant, though not personally liable for the payment of the indebtedness secured by the mortgage. The principal, if not the only alleged ground of error, is that the decree of the court is *in personam* as against the plaintiffs in error. In this respect the decree is as follows:

“Cause is heard on the bill; answer of guardian *ad litem*; replication thereto and the said report of master, and the

court finds that the allegations of the bill are true and that the court has jurisdiction of the subject-matter and parties. That there is due from defendants to complainants for principal and interest \$1,263.61 and \$50 for attorney's fee. Ordered, adjudged and decreed that defendants pay to complainant, within ten days, said sum of money, with lawful interest from April 30th, and \$50 attorney's fee, and the costs of this suit. Further decreed that in default of such payment the mortgaged land, or so much as may be necessary to satisfy decree, be sold at public vendue, for cash, at the court house in Winchester, Scott County, by the master in chancery, after advertising in a newspaper of said county three weeks and posting three handbills a like length of time, and out of proceeds pay costs and amount due complainants."

The decree is objectionable in so far as it purports to find an amount due from the plaintiffs in error to the defendants in error, and further in ordering, decreeing and adjudging that the plaintiffs in error should pay such sum to the defendants in error. We do not, however, think it is a decree *in personam*. While an indebtedness is declared against and the same ordered to be paid by the plaintiffs in error, yet the consequence of a default in this respect is limited and confined by the decree to a sale of the mortgaged premises. There is no decree for the payment of any deficiency that might exist after the sale of the land.

When the whole decree is considered together and in connection with the law governing proceedings in equity for decrees of foreclosure, we think it clear that the objectionable features of the decree are not such as to demand its reversal.

In the severity of the common law, the interest of a mortgagor in the mortgaged premises depended upon the exact performance of the conditions of defeasance. Default therein worked absolute forfeiture of the estate. Equity, however, regarded the mortgage as a security only for the indebtedness, and established a right of redemption after default. To enable the mortgagee to have this right of

redemption limited to some fixed period, courts of chancery entertained bills to declare and fix a time after default within which this right of redemption must be exercised or be thereafter barred and lost. Decrees upon such bills rested upon purely equitable principles and were solely for the purpose of foreclosing this right of redemption. The courts rendering them were without power or jurisdiction in such proceeding to render personal decrees for the indebtedness secured by the mortgage or even for a part of such indebtedness remaining unpaid after the sale of the mortgaged premises. Vol. 8, Amer. and Eng. Ency. of Law, page 264 and 265, and cases cited in note 1, page 264.

The mortgagee might, if he desired a judgment *in personam*, bring his action at law upon the indebtedness, and might at the same time file a bill in chancery for the foreclosure of the mortgagor's equity of redemption. The remedies are concurrent. 4 Kent's Com., 184.

The powers and jurisdiction of the courts of Illinois have been increased in respect of such matters by statutory enactment, but with this statutory power added the courts of our State are yet without jurisdiction to render judgments or decrees for the payment of the mortgage indebtedness against defendants in foreclosure proceeding. The only addition to their power is such as is given by Sec. 16, Chap. 95, of the Revised Statutes, which authorizes the rendition of a personal decree for "*the balance of money that may be found unpaid*," after the mortgaged premises have been sold and the proceeds applied upon the indebtedness. A decree against the defendants in a foreclosure proceeding for the whole debt would, therefore, be wholly extra judicial. In the case at bar the court did not attempt to exercise the statutory power, and it had otherwise no authority to render a money decree against any one.

In the case of *Gochenour v. Mowry*, 33 Ill. 331, speaking of a decree almost precisely the same as the one under consideration, it is said: "But we regard the decree as in effect an alternative one; that if the money is not paid by the time limited then the premises shall be sold, giving the

defendants the option to pay the money or suffer the property to go to sale." Such decrees the court in the same opinion held were not *in personam*. The findings in the decree that the plaintiffs in error are, or were, indebted to the defendants in error in the sum named, and the order or judgment that they pay such sum within ten days to the defendants in error, or in default, that the mortgaged lands be sold, do not, we think, constitute a money decree personal against any one. The legal consequences of a failure to pay the money is not that the general estate of the plaintiffs in error may be seized by execution or sequestered, but that the particular estate pledged to the payment by the mortgage indebtedness shall be sold and the proceeds applied in payment, and this is clearly expressed in the decree. Moreover it was, as we have seen, beyond the power of the court to render a money decree in the case against any one for the payment of the entire indebtedness. If we regarded the decree as a personal money decree we would direct its modification so as to remove that feature, and restrict the effect so that it should apply only to the property described in the mortgage. The other alleged errors have either been remedied by amendments of the record made by leave of this court or are such as do not affect the plaintiffs in error, and to which objection has been waived by the persons who might have been heard to complain of them. The decree must be and is affirmed.

Roberts et al. v. Applegate.

1. *Warranty—What Constitutes.*—A. sold a stallion to R. Pending the bargain R. asked for the pedigree. A. handed him a catalogue, telling him that the pedigree of the horse was on page seven. When he asked about the horse being a sure foal getter, A. answered that there was no doubt about that, that the catalogue contained all that was necessary for him to say about that. As to the quality of the horse as a foal getter the statement in the catalogue was, "He will attract attention anywhere and make his mark as a foal getter." It was held that this was by no

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means a warranty that the horse would attract attention or prove a foal getter, but was only an expression of the belief of the seller as to what might be expected of the horse in the future.

Memorandum.—Mortgage foreclosure in chancery. Writ of error to the Circuit Court of Hancock County; the Hon. CHARLES J. SCHOFIELD, Circuit Judge. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

PLAINTIFF'S STATEMENT OF THE CASE.

On the 5th day of December, 1890, James T. Applegate filed his bill in chancery in the Circuit Court of Hancock County, to foreclose a mortgage dated April 5, 1883, given by the defendants, Stephen E. Roberts and Nancy E. Roberts, his wife, in which they conveyed to Applegate certain real estate in Hancock County, Illinois. The mortgage was given to secure two promissory notes for the sum of \$750 each, one due on or before one year after date, and the other due on or before two years after date, with seven per cent interest after date. The annual interest was paid on both of said notes to April 5, 1889.

The bill of complaint alleges that the full amount of the principal of both of said notes and the interest thereon from April 5, 1889, remained unpaid. The defendants answered the bill saying that the two notes were given for the stipulated price of an English shire stallion, sold by Applegate to Roberts. That Applegate stated to said Roberts and contracted and agreed with him that the stallion was a pure bred, eligible to registration, registered full-blooded English shire stallion, and was an ordinary sure foal getter. That said stallion was recorded and registered in volume 4 of English Cart Horse Stud Book, under the name of "Young Wonder," and by virtue of his record in said stud book, entitled to the name of "Young Wonder" No. 2957.

That said stallion was not eligible to registration; was not a full-blooded, registered and recorded English shire stallion at the time defendant bought him, and was not re-recorded, registered, pedigreed and numbered in said English

Cart Horse Stud Book, as claimed and represented by said Applegate; that he was not eligible to such registration, recording, pedigreeing and numbering.

That he was not an average sure foal getter; that by reason of the facts aforesaid the said stallion was not worth to exceed one hundred dollars.

And that by reason of the false statements of said Applegate, aforesaid, he is not entitled to the relief prayed for in his said bill.

The complainant then by an amendment to his original bill denied the warranty and breach thereof, and stated that if such warranty was made it was verbal and not in writing, and was entered into more than five years prior to the commencement of this suit; that such claim of warranty is barred by the statute of limitations.

The defendants then amended their answer and stated that such alleged contract was and is in writing.

To this answer of defendants, as amended, the complainant filed his general replication. On those issues the cause was tried by the Circuit Court, a decree rendered for the full amount of said notes, and \$100 solicitors' fees and costs of suit, and the land described in the mortgage ordered sold to satisfy said amounts.

Page 7 of Mr. Applegate's catalogue referring to the horse:

"YOUNG WONDER, Vol. 4, E. C. H. S. B., Lot 7, Shire Horse, brown, face and right hind ankle white; foaled 1880.

Bought of R. Mendham, St. Edmonds, Lincolnshire, Eng.

SIRE.—Thumper (Clark's) (2136); see pedigree Thumper 2d.

DAM.—By Wiseman's Wonder (2357), by Matchless (1509). See in Mistakes' pedigree, lot 5.

G. DAM.—By Farmer's Glory.

Here, again, we have a strong, powerful colt, large size, with bone enough and to spare, if such a thing were possible; fine feather and good action. He will attract attention anywhere, and make his mark as a foal-getter."

Page 33 of Vol. 4, English Cart Horse Stud Book. List of the horses, names and numbers, imported by James T. Applegate:

APPLEGATE, J. F.

STALLIONS.

Cromwell, Junior (2753).....R. Porter, Vol. IV.
Magnet (2830).....T. H. Miller, Vol. IV.

BREEDER.

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STALLIONS.	BREEDERS.
Model Tom, Jun. (2843).....	Daniel Lewis, Vol. IV.
Sensation Again (2898).....	R. A. Crow, Vol. IV.
Stamp of England (2917).....	W. Taylor, Vol. IV.
Wonder of the East (2957).....	R. Mendon, Vol. IV.
MARES.	
May Flower.....	T. H. Miller, Vol. IV.
Molly	T. H. Miller, Vol. IV.

PLAINTIFF'S BRIEF.

Whether there was an express warranty or not, there was an implied warranty, from which the defendant in error can not escape.

Plaintiffs in error purchased the horse in question for a particular purpose. Defendant in error, the seller, knew this fact at the time.

In Benjamin on Sales, Vol. 2, p. 867, Sec. 993, it is said : "If a man buy an article for a particular purpose, made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose."

In the case of White v. Miller, 71 N. Y. 118, 131, it is held that on a sale of seed there is an implied warranty that "the seeds sold were free from any latent defect arising from the mode of cultivation."

A manufacturer who sells a steam boiler impliedly warrants that it is made of sound material and good workmanship. Beers v. Williams, 16 Ill. 69.

J. L. BAILEY and O'HARRA, SCOFIELD & HARTZELL, attorneys for plaintiffs in error.

DEFENDANT'S BRIEF.

The warranty relied on by plaintiffs in error is not in writing, because a contract can not be partly in writing and partly in parol, and they must resort to parol evidence to establish the defense relied upon in this case; and their attorneys only claim that "the statements and representations upon which the horse was bought and sold were in the

main contained in Mr. Applegate's catalogue." The statement in the catalogue as to the horse being a foal-getter was a mere expression of opinion, and Applegate had a right to extol the superior qualities of his horse. *Fauntleroy et al. v. Wilcox et al.*, 80 Ill. 477.

The defense appears to be an attempt to rescind the contract on account of fraud. But he must rescind at the time he discovers the fraud, and this he did not do. He must put Applegate in *statu quo* by a return, or an offer to return the horse. *Smith et al. v. Doty*, 24 Ill. 163; *Bowen et al. v. Schuler*, 41 Ill. 192; *Morgan & Co. v. Thetford*, 3 Brad. 323.

NEECE & SON, attorneys for defendant in error.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was a bill in chancery filed by the defendant in error to foreclose a mortgage given April 5, 1883, by plaintiffs in error to secure two notes, each for \$750, one due April 5, 1884, the other April 5, 1885, both bearing interest at seven per cent per annum. The defense interposed was that the notes were given for a stallion sold by Applegate to Stephen E. Roberts, with a warranty that the stallion was an ordinary foal-getter, and a pure bred English shire horse, under the name of Young Wonder, No. 2957, and entitled to that name and number, and that such warranty was broken.

The Circuit Court found the issues for the defendant in error and rendered a decree accordingly, to reverse which this writ of error was sued out.

The statements and representations relied upon to constitute the alleged warranty are mainly to be found in a printed catalogue issued by the defendant in error. Roberts testified that when he asked for the pedigree of the stallion (then a colt of the age of three years), Applegate handed him a catalogue and told him that the pedigree of the horse was on page 7, and that when he asked "about the horse being a sure foal-getter," Applegate replied, "there was no doubt about that and the catalogue contained all that was necessary for him to say on that subject

as well as to the pedigree of the horse.” Roberts testified to some verbal statements of Applegate, which met a direct denial from Applegate, and were at most, even if deemed proven, but mere expressions of opinion as to the future of the animal. Applegate told Roberts that the pedigree and registration of the colt would appear in the 4th volume of English Cart Horse Stud Book, when that volume was issued as it appeared in the catalogue. This 4th volume was issued in 1883, and did contain the pedigree and number of the colt as did the catalogue, but the Stud Book gave the name as “Wonder of the East” while the name given in the catalogue is “Young Wonder.” The breeder of the colt was given in the catalogue as “R. Menshaln” and in the Stud-Book, as “R. Mendon.” These discrepancies, together with testimony tending to show that this horse was not a sure foal-getter, were relied upon as constituting a breach of the warranty.

It was clearly proven that the colt sold to Roberts was the identical animal registered in the Stud Book, and had the pedigree, age and number there given. That he was bred by “R. Mendon” and that Applegate purchased him from Mendon in St. Edwards, Lincolnshire, England. That the name Menshaln in the catalogue was a mere error in spelling the name of the breeder, and that Applegate believed when he issued the catalogue that the true name of the colt was “Young Wonder” as there given. This mistake as to the name of the colt, if important, was known to Roberts some years before the filing of the bill. He paid the interest upon each of the notes annually from 1883 to 1889, during several years of which period he knew of the error in the name of the horse. He finally disposed of the horse in a trade for another stallion without having ever complained to Applegate of any failure of the warranty. We think there is no merit in this branch of the defense.

As to the quality of the horse as a foal-getter the statement in the circular is—

“He will attract attention anywhere and make his mark as a foal-getter.”

This is by no means a warranty that the "colt would attract attention" or prove a "foal-getter" but is and only purports to be an expression of the belief of the seller as to what might be expected of the horse in the future.

The decree is right and must be affirmed.

Mainard v. Webb, Sheriff, et al.

1. *Injunction—Allowance of Damages on Dissolution—Services of Counsel.*—Where the services of counsel are directed to the defeat of a bill in chancery upon the main question, and no service is required to obtain a dissolution of the injunction aside from the hearing on the merits, and when it is apparent that the services of counsel would be the same whether there was an injunction or not, the injunction being a mere incident and not the occasion for any special services of counsel apart from the general defense on the merits, it is improper to allow counsel fees as damages.

Memorandum.—Suit to enjoin the collection of a fee bill. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed in part and reversed in part. Opinion filed October 17, 1892.

APPELLEES' STATEMENT OF THE CASE.

In the month of November, 1890, K. Mainard, the appellant, commenced suit before a justice of the peace against D. M. Patterson, to recover the value of a horse belonging to her, which she claimed was injured while in his pasture.

Patterson was not represented by an attorney before the justice of the peace and judgment was rendered against him for the value of the horse. Patterson took an appeal to the County Court of Moultrie County. At the January term, A. D. 1891, of the County Court, the case was tried. After hearing the case the jury returned a verdict in favor of the defendant, Patterson. Upon return of the verdict by the jury the appellant asked the court to set aside the verdict and grant her a new trial. Upon the argument of the motion

Mainard v. Webb.

such facts were presented to the court as satisfied it that appellant should have a new trial, but that the cost of the case should be paid by her. Appellant applied for and obtained from one of the judges of the Circuit Court an injunction restraining the sheriff from collecting the cost from her.

R. M. PEADRO, solicitor for appellant.

JOHN R. & WALTER EDEN, and F. M. HARBATGH, attorneys for appellees.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was a bill in chancery filed by appellant against the appellees, alleging that a certain judgment for cost had been erroneously and improperly entered against appellant by the clerk of the County Court, and that a fee bill therein had been issued by the said clerk and was then in the hands of the sheriff of the county for collection. The bill sought to set aside the judgment and a temporary injunction was granted to prevent the collection of the fee bill.

On the hearing of the case upon bill, answer, replication and proof the court found the issues for the defendants, dismissed the bill, and dissolved the injunction, and upon a suggestion of damages filed by the defendants assessed the sum of fifty dollars as damages for attorney's fees. The record is brought here by the appeal of the complainant in the bill.

Upon the principal question as to the merits of the case we find no occasion to disagree with the conclusion reached by the Circuit Court.

The charge in the bill that the judgment against the plaintiffs for cost was improperly entered by the clerk rested upon the assumed fact that the minutes of the judge did not warrant such an entry, or if so, that said minutes had been changed so as to show a judgment different from that orally announced by the court. We are satisfied that the minutes were not changed and that the judgment entered by the clerk is supported thereby. Indeed, the judgment as en-

tered is in the very words of the minutes, and if it is faulty in any respect it is in not being sufficiently elaborate.

Of this, however, in a court of equity no notice should be taken, and so far as the decree dismissing the bill is concerned the action of the court was perfectly proper.

As to the allowance of damages upon the dissolution of the injunction we think there was error. The injunction was granted for the purpose of staying the action of the sheriff until the main question could be determined, whether the judgment was properly entered.

There was no motion to dissolve before the hearing on the merits and the whole controversy was as to the propriety of the judgment.

The services of counsel for which the damages were allowed were directed to the defeat of the bill upon the main question; no service was required to obtain a dissolution of the injunction aside from the hearing on the merits, and in all respects it is apparent the services of counsel would have been precisely the same whether there was an injunction or not. The injunction was really a mere incident and was not of itself the occasion for any special services of counsel apart from the general defense on the merits. Under such circumstances the defendants were not entitled to an allowance for damages on that account. *Blair v. Reading*, 99 Ill. 600; *Monartz v. Galt*, 125 Ill. 417. *Mackey v. Plumb*, 36 Ill. App. 604.

It has been suggested that damages are allowable on the ground that the injunction was to prevent the enforcement of a judgment.

We do not so construe the statute, and are of the opinion that the judgment there intended is that recovered on account of liability established, and that it does not include or embrace the incidental recovery of costs allowed the successful party under the statute in reference to cost.

So much of the decree as dismissed the bill and dissolved the injunction will be affirmed. So much of it as allowed damages on the dissolution of the injunction will be reversed. The cost in this court will be equally divided. Affirmed in part, reversed in part. Cost divided.

Mut. Benefit Life Ass'n v. Coats.

Mutual Benefit Life Association of America v. Coats.

1. *Insurance—Waiver of—Conditions.*—Where a health certificate, which was required by the by-laws of an insurance association for the purpose of reinstatement after a lapse, by reason of a failure to pay an assessment, was sent to the assured, whose policy had lapsed, with a notice that it was necessary, and the assured, being an illiterate person, sent it to another person with a request to sign the assured's name to it and forward it to the association, which was done, and the association, knowing that it was not the signature of the assured, received thereafter twenty-five consecutive and regular payments for annual dues and mortuary assessments, *it was held* that the receipt by the association of subsequent dues and assessments was a waiver of any possible irregularity in the execution of the health certificate.

2. *Limitation under By-laws—Waiver.*—Where the by-laws of a benefit life association provided that—"In any suit, proceeding or action brought upon a certificate of membership or claim thereunder after the expiration of one year next after the death of the member, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced, any statute of limitations of any state or government to the contrary notwithstanding"—and pending a negotiation in regard to the settlement of a claim, if the action of the association is such as to create in the mind of the claimant a reasonable hope that an adjustment would be made and thereby deter him from bringing his suit, the association will be estopped from interposing the defense of the limitation, because it had by its own course misled the claimant by inducing him to believe that his claim would be settled.

Memorandum.—Action on a benefit certificate in a life insurance association; appeal from a judgment rendered in favor of appellee by the Circuit Court of Sangamon County; the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

Article 10 of By-Laws offered in evidence.

Sec. 3. In any suit, proceeding or action brought upon a certificate of membership or claim thereunder, against the association, after the expiration of one year next after the death of the member, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced, any statute of limitations of any state or government to the contrary notwithstanding.

The opinion states the case.

APPELLANT'S BRIEF.

The validity of limitations like these has been repeatedly

questioned (for it has ever been the public rule to regard an insurance contract as only binding on the company); although questioned, their legality has been uniformly sustained, and it may now be considered as settled that such provisions are valid. In the long list of cases in which this point has been litigated there are but two, both fire insurance, where it has been overruled: *French v. Lafayette Insurance Co.*, 5 McLean (U. S.), 461, and *Eagle Insurance Co. v. Lafayette Insurance Co.*, 9 Ind. 443.

The time clause has been sustained in the following cases: *Riddlesbarger v. Hartford F. Ins. Co.*, 7 Wall. (U. S.) 386; *Roach v. N. Y. & E. F. Ins. Co.*, 30 N. Y. 546; *Ripley v. Etna F. Ins. Co.*, 29 Barb. 552; S. C., 30 N. Y. 136; *Ames v. N. Y. Union F. Ins. Co.*, 4 Kern (N. Y.), 253; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.), 596; *Keim v. Home Mut. F. & M. Ins. Co.*, 42 Mo. 38; *Fulman v. N. Y. U. F. Ins. Co.*, 7 Gray (Mass.), 61; *Cray v. Hartford F. Ins. Co.*, 1 Blatch. C. C. (U. S.) 80; *Wilson v. Etna F. Ins. Co.*, 27 Vt. 99; *Brown v. Roger Williams F. Ins. Co.*, 5 R. I. 394; S. C., 7 R. I. 301; *N. Y. F. Ins. Co. v. Phoenix O. & C. Co.*, 31 Penn. 448; *Brown v. Savannah Mut. F. Ins. Co.*, 24 Geo. 97; *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 287; *Gooden v. Amoskeag F. Ins. Co.*, 20 N. H. 73; *Patrick v. Farm F. Ins. Co.*, 43 N. H. 621; *Yoell v. Manhattan Ins. Co.*, 3 Pacific Law Rep. 9. In *Williams v. Vt. Mut. F. Ins. Co.*, 20 Vt. 222, and *Portage Co. Mut. F. Ins. Co. v. West*, 6 Ohio St. 699, a similar limitation contained in the charter was sustained. *Ketchum v. Protection F. Ins. Co.*, 1 Allen (New Brunswick) 135, 187, is an able decision upholding such limitation. Some of the States which recognize the right to enforce such limitations have restricted it by statutes. *Nerck. Mut. F. Ins. Co. v. Lacroix*, 35 Texas, 249; *Cray v. Hartford F. Ins. Co.*, 1 Blatch. C. C. (U. S.) 280; *Wilson v. Etna F. Ins. Co.*, 27 Vt. 99. A waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition. *Repley v. Aetna Ins. Co.*, 30 N. Y. 136.

Mut. Benefit Life Ass'n v. Coats.

SANDERS & BOWERS, attorneys for appellant.

APPELLEE'S BRIEF.

The law does not favor any such clauses of limitation in policies of insurance, and they are strictly construed and are allowed to be readily waived. *Home Life Insurance Company v. Pierce*, 75 Ill. 426. In *May on Insurance*, Section 488, it is said, in discussing the subject of waiver of limitation clauses in contract:

“But this condition, like all others intended for the benefit of the insurers, may be waived by them; and as the condition is a harsh one in its bearing on the insured, and works a forfeiture when upheld, the courts will not require very stringent evidence in order to defeat its application. A positive act of the company, intending to induce postponement, is not necessary. And where the evidence upon this point is conflicting, waiver is a question of fact for the jury.” Where the company has lulled the plaintiff into inactivity, it is held to have waived the condition as to time. In *Bliss on Life Insurance*, Sec. 270, and *Allemania Fire Ins. Co. v. Peck et al.*, 33 App. 548, the by-laws of a private corporation bind the members only by virtue of their assent, and do not affect third persons. All regulations of a company affecting its business, which do not operate upon third persons, nor in any way affect their rights, are properly denominated by-laws of the company, and may come within the operation of the principle. *State v. Overton*, 4 Zab. 435, 61 American Decisions, 671.

Persons not members may be bound by the by-laws if they are written into the contract with the corporation, but a mere reference to them is not sufficient. *Morawetz on Private Corporations*, Vol. 1, Sec. 500.

BROWN, WHEELER & BROWN, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was an action on a benefit certificate or contract of insurance upon the life of Martha J. Coats for the benefit of

the appellee, issued by the appellant for the sum of \$2,000. The plaintiff recovered. Two principal questions arose on the trial.

1st. Whether a health certificate, such as required by the by-laws of the association, was furnished by the assured for the purpose of reinstatement after a lapse by reason of failure to pay an assessment.

It appears that the assured was an illiterate person, who signed her application for insurance by affixing her mark; that when she received notice that a health certificate was necessary she caused it to be sent to one Parsons, who was her son-in-law and agent, with the request that he sign her name and forward to the company; that he did so; that she was in fact in good health at the time, and that the company, knowing this was not her signature, received from her thereafter twenty-five consecutive and regular payments for annual dues and mortuary assessments.

In the first place, then, the signature by Parsons, at her request, was her signature.

She adopted it as such and it was so treated by the association, though its officers must have known it was not in fact made by her hand.

Secondly, the receipt by the association of subsequent dues and assessments was a waiver of any possible irregularity in the execution of the health certificate. This issue was properly determined in favor of the plaintiff.

2d. Was the suit barred because not brought within one year from the death of the assured?

The death occurred May 17, 1890, and the suit was brought June 5, 1891. It appears that there were various communications between said Parsons, on behalf of the plaintiff, and the company, with reference to the claim; that the management of the company's affairs having changed, this was made an excuse for delay and for making some additional inquiries, and that these communications were continued during a period ending some eight months after the death of the assured, the last letter from the company, bearing date, January 30, 1891, excusing delay, explaining why the

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investigation promised in preceding letters had not been commenced, and asking for an answer upon the point recently suggested, that another lapse had occurred. To this a reply was sent by Parsons, for the plaintiff, and nothing further transpired until the suit was brought.

We think the action of the company was such as to create in the mind of plaintiff a reasonable hope that an adjustment would be made and thereby to deter him from bringing his suit. Certainly this was so during the negotiations and for a reasonable time after the reply to the letter of January 30th. No further objection or inquiry being made, the plaintiff might well suppose the claim would be adjusted as soon as the proposed investigations were concluded. Previous letters had distinctly stated that the company would do what was right and had manifested a disposition to act fairly, and as already noticed, had offered ample and plausible explanations for the delay.

The reason so assigned implied also that because of the change in the administration of the company's affairs, and the great number of claims to be investigated, considerable further delay might be expected.

In view of the facts thus appearing, we think the jury could come to but one conclusion—that is, that the company ought not to interpose this defense, because it had by its own course misled the plaintiff by inducing him to believe the claim would be settled. *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220.

There is no defense disclosed by the record, and upon the merits of the case the verdict is clearly right. Indeed, we are of opinion that no other verdict could properly have been rendered. Counsel for appellant suggest sundry objections to the ruling of the court in giving and refusing instructions.

We think there is no substantial ground of objection in this behalf, and entertaining the view above expressed as to the merits of the case, we deem it unnecessary to examine and discuss the instructions in detail. The judgment will be affirmed.

Vahle et al. v. Braeckensick.

1. *Foreclosure Proceedings—Forcible Entry and Detainer—Writ of Assistance—Concurrent Remedies.*—The purchaser of lands under a decree of foreclosure may obtain possession by a writ of assistance from the court which rendered the decree, or by an action of forcible entry and detainer under the statute. These are concurrent remedies, and both may be resorted to and prosecuted until possession is obtained through one or the other.

2. *Judges—Right to Preside.*—Either of the three judges of the circuit may lawfully preside in any county in the circuit, for the whole or during only a part of the term or of any day of the term.

3. *Judges Presiding at a Term of the Circuit Court—Presumption.*—Where the convening order of the term shows that one of the judges presided at the opening of the court at the beginning of the term, or any day thereof, and a decree rendered at such term appears to be the judicial act of another judge, the presumption is not that both were presiding at the time, but that each presided at such times during the day as he lawfully should in order to perform the judicial act shown by the record to have been performed by such judge.

Memorandum.—Application for a writ of assistance. Appeal from an order of the Circuit Court of Adams County, allowing the writ; the Hon. OSCAR P. BONNEY, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October, 17, 1892.

APPELLANTS' STATEMENT OF THE CASE.

This is a proceeding instituted by a defendant in a mortgage foreclosure proceeding, who had received a master's deed for the premises sought to be foreclosed, in the nature of a petition praying the court for a writ of assistance against the appellants, who were in possession, claiming to hold the premises under a lease made by the mortgagee's wife before foreclosure proceedings had been instituted.

The foreclosure proceeding terminated in the June term, 1891, of the Circuit Court, and in the month of September, 1891, appellee, in an action of forcible detainer before a justice of the peace, recovered a judgment for the premises in controversy. From this judgment, appellants appealed to the October term, 1891, of the Circuit Court, where, with a trial

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before the court and jury, a judgment was rendered in favor of appellants, and this judgment remains, and now is in full force and effect in said court. Thereupon and thereafter the appellee entered his motion to redocket this foreclosure proceeding, notice of such redocketing being given to appellants, and filed his petition praying for a writ of assistance. Appellants, by way of demurrer and plea, set up the defense of a former recovery before the same court at the same term, and the court went into the hearing of said cause and awarded the appellee the writ prayed for and rendered the decree appealed from.

APPELLANTS' BRIEF.

The requirements of the statute regarding the jurisdiction of courts over property and person must be complied with, with regard to service of process. *Cast v. Rose*, 17 Ill. 276; *Boyland v. Boyland*, 18 Ill. 551; *Tompkins v. Whittinger*, 556 Ill. 385; *Piggott v. Snell*, 59 Ill. 106; *Greenwood v. Murphy*, 131 Ill. 604; *Hessler v. Wright*, 8 Brad. 229; *Sconce v. Whitney*, 47 Ill. 413; *Wilhite v. Pearce*, 12 Ill. 150.

Should a writ of assistance become necessary to put the appellee in possession of the premises, he should be required to present the facts requiring the assistance, so that the court itself may judge of the propriety of awarding the writ; and in the petition of appellee it does not appear that appellant was served with process of summons. *Bruce v. Rooney*, 18 Ill. 74; *Smith v. Brittenham*, 3 Brad. 64.

Appellee was not entitled to his writ of assistance until he offered evidence of a valid judgment against appellant. This principle has been applied in cases where title has been derived from judicial sales. *Johnson v. Baker*, 38 Ill. 98; *Kratz v. Buck*, 111 Ill. 40.

A judgment in any form of action is conclusive upon the parties upon all questions and rights involved in the litigation if the court pronouncing the same had jurisdiction. *Hawley v. Lemmons*, 102 Ill. 115; *Tilly v. Bridges*, 105 Ill. 336; *Sturdy v. Jackaway*, 4 Wall. (U. S.) 174; *United States v. Noursc*, 9 Pet. (U. S.) 8.

The Circuit Court had jurisdiction to decide any and every question under the forcible detainer act, and whether said judgment was correct or otherwise, until reversed, it was binding in every other court. *Elliot v. Piersol*, 1 Pet. (U. S.) 329; *Zimmerman v. Zimmerman*, 15 Ill. 84; *Miles v. Caldwell*, 2 Wall. (U. S.) 35; *Thompson v. Roberts*, 24 How. (U. S.) 233; 2 *Wait's Actions and Defenses*, 767; *Sanger & Camp et al. v. Fincher*, 27 Ill. 346; *Rogers v. Higgins*, 57 Ill. 244; *Kelly v. Donlin*, 70 Ill. 378.

And when a party has the choice of remedies, selects one and proceeds to judgment, he can not afterward proceed in another suit for the same cause of action. *Kendall v. Stokes*, 3 How. (U. S.) 87; *Thompson v. Howard*, 31 Mich. 312; *Jenkins v. International Bank*, 111 Ill. 462; *Flowers v. Brown*, 21 Ill. 270.

L. H. BERGER, appellants' attorney.

APPELLEE'S BRIEF.

The Circuit Court had full authority and jurisdiction to award the writ of assistance or possession against appellants to put appellee in possession of the premises purchased at the sale under the decree of foreclosure. The proceeding was not a new suit, but only a further step in the foreclosure suit. *Freeman on Executions*, 2d Ed., Sec. 37 d, 37 e; *Oglesby v. Pierce*, 68 Ill. 220, and cases there cited; *O'Brien v. Fry*, 82 Ill. 87; *Kessinger v. Whittaker*, 82 Ill. 22; *Aldrich v. Sharp*, 3 Scam. 261.

The remedies given to a purchaser of land, under a decree of foreclosure, by writ of assistance or possession and by forcible detainer, are concurrent, and both may be pursued until satisfaction is had. And the pendency on appeal of a forcible detainer suit for possession can not be set up in abatement of a motion for a writ of possession in the original cause. *Kessinger v. Whittaker*, 82 Ill. 22.

Judgment in a forcible detainer case, adverse to the purchaser at a foreclosure sale, claiming under the master's deed, is not a bar to a writ of assistance in the foreclosure suit.

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when at the time of the institution of the forcible detainer case the plaintiff as such purchaser had not produced to the parties in possession the master's deed and a certified copy of the decree. *Cochran v. Fogler*, 116 Ill. 194.

CARTER, GOVERT & PAPE, solicitors for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was an application by the appellee for a writ of assistance under a decree of foreclosure to put him in possession of certain premises in the decree involved, as the holder of a master's deed under the decree. The court below awarded the writ. The appellants urge that it ought not have been granted, because—

First. That the appellant Frederick A. Vahle was not served with process in the foreclosure proceeding.

Second. That prior to the application for the writ of assistance the appellee had instituted an action of forcible detainer, under the 6th clause of the 2d section of the Forcible Entry and Detainer Act, and had been defeated in such action, which appellants claim constituted a bar or estoppel of the application for the writ of assistance.

The amended record, filed by leave of this court, shows that the appellant Frederick A. Vahle was duly and lawfully served with summons in the foreclosure proceedings, which disposes of the first of appellants' grounds for reversal. The purchaser of lands under a decree of foreclosure may obtain possession by writ of assistance from the court which rendered the decree, or by an action of forcible detainer under the statute. These are concurrent remedies and both may be resorted to and prosecuted until possession is obtained through one or the other. *Kessinger v. Whittaker*, 82 Ill. 22.

While the same recovery is sought by both forms of procedure, the preliminary steps required of the plaintiff or moving party are not the same in each. A determination of either in favor of the party in possession would not necessarily bar a further prosecution of the other because

such might result from a failure to comply with the decree or the statute in a mere preliminary requirement. At the time of the commencement of the action of forcible detainer the appellee had not produced to the appellant the master's deed or certified copy of the decree or order of the court, as required by the decree, before a writ of assistance could issue.

So, when the action of forcible detainer was instituted, the appellee had no right to a writ of assistance, and such action could not bar a right that had no existence when the action was instituted. *Cochran v. Folger*, 116 Ill. 194.

The right to a writ of assistance inured after the institution of this forcible detainer suit and existed wholly independent of and unaffected by the unfavorable result of such suit, though only one recovery can be allowed.

It is suggested that it appears from the transcript that the decree was rendered by one having no judicial authority to do so, or that two judges of the court were presiding over the same court at the same time, which they could not lawfully do.

In the absence of competent proof to the contrary, we must presume that the decree certified to us by the clerk of the Circuit Court as the decree of that court was rendered by one having judicial authority so to do.

Either of the three judges of the circuit may lawfully preside in any county in the circuit for the whole or during only a part of the term or of any day of the term.

When the convening order shows that one of the judges presided at the opening of the court at the beginning of the term, or any day thereof, and the decree appears to be the judicial act of another of such judges, the presumption is not that both were presiding at the same time, but that each presided at such times during the day or term as he lawfully should in order to perform the judicial act shown by the record to have been performed by such judge.

The order of the court awarding the writ of assistance was correct, and is affirmed.

Bussey v. Hemp.

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1. *Promissory Note Transferred by Blank Indorsement, etc.—Presumption.*—When the transfer of a negotiable note is made by indorsement without date and the actual time of the transfer is not proven, the presumption of law is that the note was transferred before maturity; this presumption, however, is slight and weak and may be overcome by proof.

2. *Order of Proofs.*—The order in which competent evidence shall be received is largely in the discretion of the court, and not subject to review except where the discretion is clearly abused.

Memorandum.—Action upon a promissory note. Appeal from a judgment of the Circuit Court of Sangamon County, for the defendants. The Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

This case was brought by Samuel T. Bussey, indorsee, to recover on a promissory note made by J. H. Hemp and Samuel Metcalf to J. B. Tibbitts, indorser, which note is as follows:

\$90. LANESVILLE, ILL., July 22d, 1890.

Thirty days after date we promise to pay to the order of J. B. Tibbitts ninety (90.00) dollars at Urbana, Ill. Value received. No. 10764.

J. H. HEMP,
SAMUEL METCALF.

Indorsed on the back "Joseph B. Tibbitts."

The case was originally brought before a justice of the peace and a verdict rendered in favor of the plaintiff for \$93.90, principal and interest after maturity, but upon appeal to the Circuit Court a verdict was rendered in favor of defendants, and the plaintiff appealed.

APPELLANT'S BRIEF.

The defendants having admitted the making of the note, the plaintiff was presumptively a *bona fide* holder. This being true, the defendant, before he advanced the defense of

“failure of consideration,” should have been required to impeach the position of the plaintiff by adducing evidence, sufficient to go to the jury, tending to negative the plaintiff’s good faith. *Irwin v. Wright*, 33 Mich. 32; *Abbott’s Trial Evidence*, 447; *Samuel P. Brown et al. v. Simon A. Spofford*, 95 U. S. 474.

It is hardly necessary to add that all the presumptions were in favor of the plaintiff in this case, and we deem the language of the court in the case of *John W. Cisne v. Abram Chidester*, in 85th Ill. 523, as strictly applicable to the case at bar, wherein the court says:

“Where a promissory note is indorsed and there is no evidence of the time of the indorsement, or tending to charge the assignee with notice, he will be presumed to be a *bona fide* holder for a valuable consideration, before maturity, and the question of a want or failure of consideration can not arise in a suit on the note by such assignee.” *Murry v. Lardner*, 2 Wallace (U. S.), 110.

SELBY BROS. and GEO. A. WOOD, attorneys for appellant.

APPELLEES’ BRIEF.

So far as the assignments of error on ruling upon admitting or excluding evidence are concerned, we submit that as no such questions were raised by motion for new trial they can not be considered here. *O. O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 111; *Miller v. Ridgely*, 19 Brad. 308; *Clause v. Bullock P. P. Co.*, 20 Brad. 116.

Appellant does not assign for error entering of the judgment on the verdict even. The only question to be decided is the one which was passed on by the jury, the pure question of fact as to whether appellant was a *bona fide* purchaser before maturity. There is very little controversy about the law applicable to this case and we do not believe a full consideration of the evidence will cause this court to differ with the jury and trial judge. Counsel cites in their brief part of the syllabus in *Cisne v. Chidister*, 85 Ill. 523, as the law. While we recognize the rule laid down in the opinion as correct in a case “where there was no evidence whatever as

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to the time of the indorsement of the note or of any want of good faith," yet we submit this case does not fall within that category.

The true rule upon this question is that the indorsement is presumed to have been made at the date of the note, where there is no date to the indorsement. *Stewart v. Smith*, 28 Ill. 408; *White v. Weaver*, 41 Ill. 412; *Clark v. Johnson*, 54 Ill. 298.

Where it is shown to have been made after the note the burden is on the holder to show it was indorsed before suit was brought. 2 *Randolph on Commercial Paper*, Sec. 686.

While this rule has sometimes been stated to be a "before maturity" presumption, yet it is founded on this rule of date of the note. Apart from this general rule there is no presumption as to the date. *Benjamin's Chalmer's Digest on Notes and Bills*, p. 136, Art. 122.

This presumption may be rebutted, and when evidence tending to rebut it is introduced it becomes a question of fact for a jury. *Daniel on Negotiable Instruments*, Vol. 1, p. 642, Sec. 784, thus speaks of this presumption:

"But the presumption as to the time of acquiring the instrument is not a strong one. The indorsement is invariably without date and without witnesses. The transfer, by delivery merely, leaves no footprints upon the paper by which the time can be traced. And the presumption in favor of the holder as to the time of transfer, being without any written corroborative testimony, is of the slightest nature, and open to be blown away by the slightest breath of suspicion."

CONKLING & GROUT, attorneys for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was an action brought by the appellant to recover upon a note given by appellees to one Tibbitts, who indorsed it to the appellant. A trial before a jury resulted in a verdict and judgment against the appellant. It is not questioned but that the appellees established a good defense as

against the original payee. The only material question arising is whether the appellant purchased the note before or after maturity, the defense failing if the purchase was before the note fell due. The indorsement upon the note is without date, and the actual time of the transfer is not proven. The presumption of law is that the note was transferred before maturity. This presumption is, however, slight and weak, and may be overcome and rebutted by proof. Parson's Notes and Bills, Vol. 1, page 255; Daniel's Negotiable Instruments, Sec. 784, Vol. 1.

Facts and circumstances were proven tending to show that the note was past due when appellant purchased it, and we are not prepared to say such evidence was insufficient to overcome the legal presumption to the contrary, weak and slight as such presumption is. Complaint is made that the court admitted evidence relating to the failure of the consideration of the note before all the evidence bearing upon the question of the date of its transfer was offered.

The order in which competent evidence shall be received is largely in the discretion of the court, and not subject to review except the discretion is clearly abused. We do not think the appellant has just grounds of complaint of the action of the court in this respect.

Finding no error the judgment is affirmed.

Smith v. Davis, Trustee, etc.

1. *Contracts—Appointment of Trustee, etc.—Parties.*—Where by the terms of a contract it is expressly provided that payments should be made to a trustee to be selected, by virtue of his selection such a trustee becomes entitled to demand the money and there is no reason why he should not be permitted to enforce the demand by suit.

2. *Contracts—Trustee—Capacity in Which He Acts.*—Where by the express terms of a contract the parties appoint an agent or trustee, and expressly agree to pay installments of money mentioned therein to him, it can not be urged that such a trustee is the trustee or agent for both parties in the management and disbursement of the moneys. It is the duty

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of the parties to make the payments to the trustee, and they can not be permitted to omit doing so on the plea that in reference to the use of the money the trustee was required to regard certain other provisions of the contract intended for their protection.

3. *Construction of Contracts.*—Where the parties to a contract employ language having a plain and ordinary meaning, it is not competent for the courts to destroy that meaning even though it may appear that in certain contingencies the result would be somewhat harsh or even unexpected; it is presumed that the parties fully considered all contingencies and if they did not that they intended to abide by the terms of the contract in any event.

4. *Tender.*—Where, under the terms of a contract for the sale of real estate, payments were to be made, not to the owner of the land but to a trustee named in the contract, *it was held* that it would be proper for the trustee to make the tender of the deed. The payment of the money and the delivery of the deed being concurrent acts it would, of course, be expected that the person who is to receive the money should be ready to furnish the deed, though it had to be executed necessarily by the owner of the land.

Memorandum.—Assumpsit. Writ of error to the Circuit Court of McLean County to reverse a judgment entered by that court in favor of the plaintiff; the Hon. CHARLES R. STARR, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

The opinion of the court states the case.

PLAINTIFF'S BRIEF.

It is laid down as a general principle that the same individual can not be the agent of both parties. *Hinckley v. Arey*, 27 Me. 361; *Greenwood v. Spring*, 54 Barb. (N. Y.) 375.

Nor can an agent, in the same transaction, act for himself and his principal. *Newendorff v. World Mutual Life Insurance Co.*, 69 N. Y. 389.

Nor can an agent interplead his principal and a third party. *Snodgrass v. Butler*, 54 Miss. 45; *Adams v. Scales*, 57 Tenn. 337.

The policy of law forbids, as conducive to fraud and inimical to fair dealing, the purchase by masters, trustees, executors, administrators, guardians, and all others at their own sales, and also all agents, who are concerned in the selling, whether such purchase be direct or indirect; and if

made, such sales are to be set aside on the application of parties interested. Rorer on Judicial Sales, second edition, Sec. 413, and cases cited.

Authority to sell does not show authority to receive payment. Clark v. Smith, 88 Ill. 298; Greenhood v. Meatox, 9 Brad. 183, and cases cited.

WILLIAM H. BEAVER, attorney for plaintiff in error.

KERRICK, LUCAS & SPENCER, attorneys for defendant in error.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was an action of assumpsit upon an instrument in writing similar to that involved in the case of Williams v. Davis, November term, 1891, of this court. To the declaration, as amended, a demurrer was interposed. The demurrer was overruled and the defendant failing to plead, further judgment was rendered against him for \$262. The record is brought here by writ of error at the instance of the defendant.

It is first urged that there is no right of action in the plaintiff. By the contract it was expressly provided that the payments should be made to the trustee to be selected. By virtue of his appointment as trustee, the plaintiff became entitled to demand the money, and there is no reason why he should not be permitted to enforce the demand by suit. Nor is there anything in the point that he was in a certain degree agent or trustee for both parties in the management and disbursement of the funds. It was the duty of the subscribers, of whom defendant was one, to make the payments to him, and they can not be permitted to omit this duty on the plea that in reference to the use of the money he was required to regard certain provisions in the contract which were intended for their protection.

The citations as to the impropriety of one being an agent for both parties are inapplicable, and while there are many instances where the principles stated in the brief have been

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laid down, it will be found that the circumstances of those cases are very different from the one at bar where, by express contract, the parties have appointed an agent or trustee, and have expressly agreed to pay the installments of purchase money to him. No further elaboration of this point is deemed necessary.

Equally untenable are the objections that the declaration fails to show that defendant agreed to the plan adopted for the selection of the lots, and that it does not appear that he was notified of the meeting of August 11th, when the lots were distributed among the subscribers. We think the averments are sufficient on both points.

It is urged the suit was prematurely brought. This position rests upon an incorrect view of the terms of the contract, which provided that \$100 should be paid at or before the selection of the lot, \$100 when the factory building was erected, and \$50 one year after date; to wit, the date of the contract.

It appears by proper averments that all these contingencies have happened, and of course the several installments should bear interest from the dates when they were due, respectively. It is distinctly averred that the building was erected, and manufacturing operations had begun before March 1, 1891, and thus was accomplished what was obviously intended by the contract. Hence there is no hardship in construing the words "one year after date" according to their ordinary meaning, and there is no just occasion to seek a different construction based upon the supposed or supposable intentions of the parties in case the erection of the factory building had been delayed beyond one year from the date of the contract.

The argument drawn from a subsequent provision of the agreement, that within one year after starting the factory a certain quantity of manufactured goods should be produced and a certain number of hands should be employed, is, in our opinion, without force.

The language "one year after date" naturally and plainly means one year from the date of the contract, and it is a

perversion to say that it means one year from the completion of the building and the commencement of the operations of the factory.

Where parties employ language having a plain and ordinary meaning it is not competent for the courts to destroy that meaning, even though it may appear that in a certain contingency the result would be somewhat harsh or even unexpected.

It is to be presumed that the parties fully considered all contingencies, and if they did not, that they intended to abide by the terms of the contract in any event.

A further objection, made in the statement but not pressed in the argument, is that the trustee could not tender the deed, and that as no deed was tendered by the owners of the land, there was no right to demand the final payment. We understand that the deed referred to in the declaration was from the owner of the land and that the objection is, the tender must have been made by him and not by the plaintiff.

The payment was to be made, not to the land owner but to the plaintiff, the trustee; hence, it would be proper for the latter to make the tender. The payment of the money and the delivery of the deed being concurrent acts, it would of course be expected that the man who was to receive the money should be ready to furnish the deed, though it had been executed, necessarily, by the party owning the land.

No other objections are urged, and the judgment will be affirmed.

McGregor v. Village of Lovington.

1. *Waiver of Objection by Taking an Appeal.*—On the trial of a suit for the violation of a village ordinance, an objection in the form of a motion to dismiss the suit by the defendant on the ground that the justice was one of the village trustees, and therefore incapacitated to sit in the case, is waived by prosecuting an appeal under the statute.

2. *Ordinances--Depositing with the Village Clerk--Filing, etc.*—Under Sec. 46, Chap. 24, R. S., requiring all ordinances of cities and villages to

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be deposited in the office of the clerk before they become effective, the village of Lovington adopted an ordinance in terms requiring all ordinances of the village to be filed instead of deposited as required by the statute. *It was held* that a paper is, in legal effect, filed when it is delivered to the proper officer and by him received to be kept on file. The deposit with the proper officer is the thing essential, of which the filing is but evidence.

3. *Depositing an Ordinance with the Clerk Sufficient.*—The depositing the ordinance with the clerk is in compliance with the statutory requirement, and sufficient so far as the validity of the ordinance is concerned. It is immaterial whether it was filed or not.

4. *Ordinances—Proof of.*—Ordinances are proven *prima facie* under the statute, when printed in book or pamphlet form and published by authority of the village board. It is not necessary that a certificate of the clerk written or printed be appended to or accompany such book or pamphlet. It is sufficient if the book or pamphlet on its title page or by printed certificate of the clerk or otherwise on its face purports to have been published by the authority of the trustees.

Memorandum.—Suit for the violation of village ordinance. Appeal from the County Court of Moultrie County; the Hon. JOHN D. PURVIS, Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

A prosecution brought by the village of Lovington, against McGregor, before a justice of the peace, for the violation of an ordinance prohibiting the sale or giving away of intoxicating liquor, resulted in a judgment against the appellant. The cause was appealed to the County Court of Moultrie County, resulting there also in a judgment against the appellant, who appeals.

To reverse the judgment appellant claims that the justice of the peace who tried the cause had not jurisdiction of the subject-matter of the suit, and consequently jurisdiction could not be conferred upon the County Court.

The cause was originally brought before Peter Lux, a justice of the peace. Appellant made affidavit for change of venue, and the said justice, instead of "transmitting all the papers and documents belonging to the suit to the nearest justice of the peace in the same district, who was not of kin to either party, sick, absent from town, or interested in the event of the suit, as counsel or otherwise," as required by

law (See Revised Statutes, Chapter 79, Sec. 30), sent the same to Jasper Bright, who was a justice of the peace in said district, and at the same time a trustee of the village of Lovington (plaintiff), as shown by admission of plaintiff. Appellant questioned Bright's jurisdiction and refused to defend before him on account of his interest in the suit. In the County Court, before the case went to trial, he made a motion to dismiss the suit for the reason that the justice who tried the case was interested in the subject-matter of the suit, and therefore having no jurisdiction to try the cause, could confer none on the County Court. This motion clearly should have been allowed in conformity to R. S., Ch. 79, Sec. 73, p. 890.

Ordinance referred to in the opinion of the court :

Be it ordained by the President of the Board of Trustees of the Village of Lovington: Section 19. All ordinances passed by the president and board of trustees shall, before they take effect, be filed in the office of the village clerk and approved by the president of said village board and duly published, as provided by the statute, within one month after their passage: *Provided*, that if the president of said board shall veto any ordinance so passed, said board may pass the same over such veto; and any ordinance so passed shall take effect and be in full force ten days after its publication, as other ordinances.

Passed February 11, 1881. Approved February 12, 1881.

Published February 23, 1881.

W. C. DAWSON, President.

Attest: JAMES H. GROVES, Village Clerk.

CERTIFICATE OF AUTHENTICATION.

STATE OF ILLINOIS, County of Moultrie, ss.—I, Thomas H. Curtis, village clerk of the village of Lovington, do hereby certify that the foregoing is a true and correct copy of the revised ordinances of the village of Lovington, consisting of 21 separate and distinct ordinances, and numbered from one to 37, both inclusive, passed by the president and board of trustees of the village of Lovington, and ordered printed and published in book form by said president and board of trustees, the same being printed and published according to law.

In testimony whereof I have hereunto set my hand and affixed the corporate seal of said village of Lovington on this, the first day of May, A. D. 1890.

[L. S.]

Attest: THOMAS H. CURTIS, Village Clerk.

The signature to said certificate being printed.

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APPELLANT'S BRIEF.

It would be a harsh rule that would require one to submit to a trial before a judge who was not only interested in the event of the suit, but was really, although not nominally, a party to the suit. To require him to do so, is contrary to all law. Cooley's Const. Lim., 410; Broom's Legal Maxims, 85.

The ordinance under which this suit was brought has never taken effect. Before the village can recover under this ordinance, it is incumbent upon it to prove that at the time of the commission of the alleged offense the ordinance had taken effect. It is not necessary for the defendant to prove that it had not taken effect. Schott v. People, 89 Ill. 197; Newlan v. Pres. & Trustees of Aurora, 14 Ill. 365; Trustees of Elizabethtown v. Lefler, 23 Ill. 90; Booth v. Town of Carthage, 67 Ill. 104.

J. R. & WALTER EDEN, attorneys for appellant.

APPELLEE'S BRIEF.

The fact that the ordinance was published by the clerk in book form by order of the board of trustees proves that they were deposited in his office, and if he did not mark them "filed" that could not affect the ordinance. The delivery of a deed to the recorder is a sufficient filing. In the clerk's certificate he says, "Passed by the president and board of trustees of the village of Lovington, and ordered printed in book form by said president and board of trustees, the same being printed and published according to law," which is a sufficient certificate to admit the ordinances in evidence. Byars v. The City of Mt. Vernon, 77 Ill. 468; Scott v. People, 89 Ill. 198; Village of Betholto v. Conly, 9 Ill. App. 339.

W. G. COCHRAN, attorney for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*
This was a prosecution against the appellant for a viola-

tion of an ordinance of the village. It came first for trial before a justice of the peace, who was at the time, one of the village trustees. The appellant, upon the theory that the justice, by reason of the fact that he was one of the village trustees, could not entertain jurisdiction of the cause, moved its dismissal.

The justice ruled that he was not so incapacitated by the trusteeship, and proceeded with the trial of the case, in which the appellant did not participate. The result was a judgment against the appellant, from which he appealed to the County Court. He renewed his motion in the County Court, where it was again overruled, whereupon the cause was tried before a jury, both parties participating. This trial resulted in a verdict and judgment against the appellant, to reverse which he brings this appeal.

Justices of the peace are given jurisdiction of prosecutions for the violation of village ordinances by Sec. 69, Chap. 24, Rev. Stat., which is the subject-matter of this suit. The justice in question had jurisdiction of the person of the appellant, and if there was any infirmity affecting his right to try the case it was because of his official connection with the village. Appeals from justices are wholly matters of statutory regulation, and the statute (Sec. 72, Chap. 79 R. S.) provides that appeals, so taken, shall be heard and determined in a summary manner, according to the justice of the case and without exception to any proceeding before the justice, unless it is that such justice had not jurisdiction of the subject-matter of the suit. (Sec. 73, Chap. 79.) By prosecuting an appeal under this statute the appellant must be held to have waived this objection, if it was ever good, as it does not question the jurisdiction of the subject-matter.

The appellant objected to the introduction of the ordinance upon which the prosecution was based, in evidence, the grounds of the objection being that the ordinance had not been filed by the village clerk, and that the certificate of the clerk thereto was defective.

Section 46, Chap. 24, R. S., requires all ordinances of a

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city or village to be deposited in the office of the clerk before they become effective. The village of Lovington adopted an ordinance to the same effect, though in terms requiring the ordinance to be filed—that is, the word “filed” is used in the ordinance, instead of the word “deposited,” as in the statute. A paper is in legal effect filed when it is delivered to the proper officer and by him received to be kept on file. The deposit with the proper officer is the thing essential, of which the filing is but evidence.

Depositing the ordinance with the clerk was in compliance with the statutory requirement, and is, we think, sufficient so far as the validity of the ordinance is concerned, whether the ordinance be marked filed or not. The clerk should, by placing the file-mark upon it, note the date and fact of its deposit in his office. If deposited, the ordinance would not be inoperative simply because the clerk neglected to file it.

The ordinance offered was printed in a book or pamphlet, which purported, as the clerk’s printed certificate clearly shows, to have been published by authority of the village trustees.

Ordinances may so be proven *prima facie* under Sec. 65, Chap. 25, of our statutes. Nor is it necessary that any certificate of the clerk, written or printed, be appended to or accompany such work or pamphlet. It is sufficient if the book, on its title page or by printed certificate of the clerk, or otherwise on its face, purports to have been published by the authority of the trustees. To this effect *Eagan v. Connelly*, 107 Ill. 458.

The proof thus made of ordinances is only *prima facie* and may be rebutted, but it is *prima facie* proof of compliance with all legal requirements.

The appellant contends that he was denied the right to so rebut this proof.

Appellant claimed, and in his brief argues, that the ordinance, to be effective, must have been filed by the clerk according to the liberal reading of the ordinance upon that subject, and with this view introduced as a witness, Francis

Newlin, village clerk of Lovington, and legal custodian of the records of the village, and propounded the following question to him:

Question: Has ordinance No. 4 been filed in your office?

An objection to this question was entertained, to which ruling appellant excepted. The appellant had, we think, the right to show that the ordinance had not been deposited for filing in the office of the clerk, but we think it immaterial whether it had been marked filed or not. The question was irrelevant and the objection to it therefore properly sustained.

Various objections made touching the alleged insufficiency of the certificate of the village clerk, which is appended to the printed ordinances, do not require consideration, if we are right in the conclusion hereinbefore expressed that no certificate whatever is required. Finding no error, the judgment must be affirmed.

McGregor v. Village of Lovington.

1. *Proof of Ordinances—Certificate of Village Clerk.*—Village ordinances may be proved by the production of a printed book of ordinances purporting to be published by the order or authority of the village trustees.

2. *Certificate of the Village Clerk—Sufficiency—Surplusage.*—Where a village ordinance, contained in a printed book of ordinances purporting to be published by the order or authority of the village trustees, accompanied by the printed certificate, including the signature of the clerk, was admitted in evidence, it was held that the certificate, including the name of the clerk, being in print, would be wholly insufficient if a certificate of the clerk was necessary. In this case being unnecessary, it was mere surplusage.

3. *Publication of Ordinances by Authority, etc.—How Shown.*—The fact that the book of ordinances was published by the authority of the village trustees may be shown by a printed statement to that effect itself.

Memorandum.—Suit for the violation of a village ordinance. Appeal from County Court of Moultrie County; the Hon. JOHN D. PURVIS, County Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

McGregor v. Village of Lovington.

APPELLANT'S STATEMENT OF THE CASE.

This is a prosecution brought by the village of Lovington against McGregor, before a justice of the peace, for the violation of an ordinance prohibiting the sale or giving way of intoxicating liquor, resulting in a judgment against the appellant. The cause was appealed to the County Court of Moultrie County, resulting there also in a judgment against the appellant. He appeals again to this court.

J. R. & WALTER EDEN, attorneys for appellant.

W. G. COCHRAN, attorney for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The appellant was adjudged guilty of a violation of an ordinance of the village; hence this appeal.

The only complaint is that the proof does not show that the ordinance was in force at the time of the commission of the offense.

Sec. 47, Chap. 24, Revised Statutes (Starr & Curtis), provides that all ordinances, before they take effect, shall be *deposited* in the office of city or village clerk. An ordinance of the appellee village, intended evidently only as a recognition of this statutory requirement, provides that all ordinances of the village shall be *filed* in the office of the village clerk before taking effect.

Appellant insists that there is no proof that the ordinance which he was charged with having violated had been deposited or filed with the clerk. A printed book of ordinances of the village was introduced in evidence, which we think was *prima facie* proof of the due enactment of such ordinance and of compliance with all statutory requirements affecting the ordinances. The ordinance of which the appellant stood charged with a violation is shown by the book of ordinances to have been in full force and effect before the commitment of the offense. It is, however, contended that the certificate of authentication attached to the book of ordinances is fatally defective, (1) because the clerk who

makes the certificate does not certify that he is the custodian of the ordinances; (2) because the certificate is not under the "hand of the clerk." The certificate, including the name of the clerk, is in print, and would be wholly insufficient if a certificate was necessary.

Ordinances may be proved by the certificate of the clerk, under the seal of the corporation (Sec. 66, Chap. 24, Rev. Stat. Starr & Curtis), and when this mode of proof is adopted, the authentication must be in compliance with Secs. 13, 14, 15 and 16 of Chap. 51 R. S., entitled Evidence, one requirement being that the certificate be under the hand of the clerk.

Ordinances may, however, be proved by the production in evidence of a printed book of ordinances purporting to be published by the order or authority of the village trustees. Sec. 66, Chap. 24, Rev. Statutes; *Lindsay v. Chicago*, 115 Ill. 120.

The latter mode was adopted in the case at bar. It was, therefore, immaterial whether such ordinances were authenticated otherwise than by the production of the printed book of ordinances.

The book introduced purported to contain the ordinances of the village, and to show when they took effect, and upon its face purported to be published by the order of the village trustees.

This is sufficient *prima facie* proof of the validity of the ordinance and of compliance with all prerequisites of the statute, including the deposit of the ordinance with the clerk, and the filing thereof by him, if such be a prerequisite. *Lindsay v. Chicago, supra*.

That the book was published by the order or authority of the village trustees may be shown by a printed statement to that effect in the book itself. *Eagan v. Connelly*, 107 Ill. 458.

No reason appearing for a reversal of the judgment, it is affirmed.

McGregor v. Village of Lovington.

1. *Cities and Villages—Ordinances Void as Against Public Policy, etc.*—An ordinance providing that “No person, except peace officers, shall carry or wear under his or her clothing, or concealed about his or her person, any pistol, revolver, slung-shot, knuckles, bowie knife, dirk, dagger or any other dangerous or deadly weapon, without the written permission of the president of the board of trustees of said village,” is invalid as against public policy, as well as being without authority of law, vesting, as it does, unlimited and arbitrary power in the president of the board of trustees to say who should and who should not carry concealed weapons, and that it is also invalid as not being in harmony with the enactment of the statute upon the same subject.

2. *Ordinances Partly Valid and Partly Invalid.*—An ordinance can not be valid in part and in part invalid so that the court can reject the invalid portion and support the residue.

Memorandum.—Prosecution under a village ordinance. Appeal from a judgment of conviction rendered by the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

The opinion states the case.

JOHN R. & WALTER EDEN, attorneys for appellant.

• W. G. COCHRAN, attorney for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was a prosecution by the village of Lovington against H. B. McGregor for an alleged violation of an ordinance of the village in relation to carrying concealed weapons.

The village recovered a judgment in the Circuit Court, and the record is brought here by the appeal of the defendant.

The only important question in the case is as to the validity of the ordinance upon which the prosecution was based. It reads as follows:

Sec. 27. No person except peace officers shall carry or wear under his or her clothing, or concealed about his or her person, any pistol, revolver, slung-shot, knuckles, bowie knife, dirk, dagger, or any other dangerous or deadly weapon, without the written permission of the president of the board of trustees of said village.

It is conceded by counsel for appellant that the State has delegated to municipalities (such as this one) power to pass ordinances prohibiting the carrying of concealed weapons, but it is argued that the power thus conferred has not been properly exercised in the present instance, and hence the ordinance is void.

We are inclined to regard the position of appellant as well taken.

Admitting the power of the village to legislate on the subject, it could not delegate the power or any substantial part of it to any officer or private citizen.

Here was a trust created for a public purpose and it was not assignable.

When the village provided that the written permission of the president of the board of trustees should exempt the person holding it from the operation of the ordinance it in effect gave that official power to say who should and who should not carry concealed weapons. In other words it delegated to the president of the board a power which had been delegated by the State to the village. Such was its direct effect.

Again, it is against public policy as well as without authority of law to vest such unlimited and arbitrary power in a single individual.

It is only by virtue of the police power of the State, based upon considerations of public necessity in respect to the peace and good order of society, that the natural right to carry a weapon can be denied, and it is essential that such power be exercised strictly in pursuance of law and in accordance with sound legal principles.

To give the chief executive officer of the village such authority as here attempted would be unsound in principle

Coverdale v. Curry.

and in the great majority of instances would be found exceedingly unfortunate in practice. It is for the law, by fixed and definite provisions, to declare when and by whom such weapons may be carried.

It is not competent for the president of the board to so declare in the first instance, nor can he be clothed with such power by the village. The law should operate on all alike, and it can not be left to the uncontrolled will of one man to exempt any one or more from its provisions. Whatever exemptions are to be made must appear in the law itself. If they are left to the discretion of one man he becomes thereby the law-giver, a thing not to be tolerated under the established system of government. A further objection, urged with force and which we regard as tenable, is that the provision here found is not in harmony with the enactment of the statute on the same subject. The following authorities are more or less in support of the views above announced: Cooley's Const. Lim., 2d Ed., 198; Ib. 204, 205; Ib. 392; City of Chicago v. Rumpff, 45 Ill. 90; E. St. Louis v. Wehrung, 50 Ill. 28; Tugman v. City of Chicago, 78 Ill. 405.

It is, however, argued by counsel for the village that an ordinance may be good in part and invalid in part, and that in such case the court will reject the invalid portion and support the residue.

We think this case is clearly not within the well settled rule applicable in such matters. East St. Louis v. Wehrung, *supra*; Cooley's Const. Lim., 2d Ed., Sec. 178-9.

In our opinion the section is clearly invalid and the village had therefore no cause of action. The judgment will be reversed.

Coverdale v. Curry.

1. *Forcible Entry*.—Where a person entered upon the possession of another without his consent, and by removing the fence and resetting the same, took possession of a strip or parcel thereof, it is a forcible entry under the terms of the statute and sufficient to support the action.

Memorandum.—Forcible entry and detainer. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

The appellee brought this suit in justice's court in forcible detainer to obtain possession of a strip of land claimed to have been taken by appellant. The finding and judgment were for appellee. Appeal was prayed and allowed. Bond filed and approved. In the Circuit Court a trial *de novo* was had, and finding by the circuit judge without the intervention of a jury, for appellee.

APPELLANT'S BRIEF.

The fence was north of the line, and it has only been moved to the true line by appellant; he did not take possession of more than he owned and was entitled to the immediate possession of. This being the case, the question arises: Is a party, who is entitled to the immediate possession of land or premises, and can enter the same in a peaceable manner, even though occupied by another, liable to an action of forcible entry and detainer? The Supreme and Appellate Court have both answered this question in the affirmative. *Dearborn Lodge v. Kline*, 115 Ill. 177; *Lee v. Town of Mound Station*, 118 Ill. 316; *City of Bloomington v. Brophy*, 32 Ill. App. 400.

The possession of plaintiff, if he had any, was held by mere sufferance so far as the evidence in this case discloses, as he does not claim to own this strip; hence his possession was subordinate to appellant, the real owner. *Lee v. Mound Station*, 118 Ill. 316; *Maloney v. Shattuck*, 15 Ill. App. 44.

WM. A. YOUNG, attorney for appellant.

APPELLEE'S BRIEF.

Title can not be tried in a summary action of this kind. *Stillman v. Palis*, 134 Ill. 532, affirming *Stillman v. Palis*, 34 Ill. App. 540; *Smith v. Hoag*, 45 Ill. 251.

Coverdale v. Curry.

In case of Fort Dearborn Lodge v. Klein, 115 Ill. 177, cited by appellant, the Supreme Court decided but one question: "That the plea of *liberum tenementum* is a proper plea in action of trespass *quare clausum fregit*, and that it was error to instruct the jury to disregard it." Gage v. Hampton, 127 Ill. 87.

Possession of land may be held in different modes: by enclosure, by the erection of buildings, or by any use that clearly indicates an appropriation to the use of the person claiming to hold the property. Gage v. Hampton, 127 Ill. 87.

Common law right of entry has been taken away in this State by statute, and any entry is forcible within the meaning of the statute that is made against the will of the occupant. Gage v. Hampton, 127 Ill. 87; Reeder et al. v. Purdy et ux., 41 Ill. 279.

The record fails to show that any evidence offered by appellant was rejected by the court, and as no propositions were submitted to be held as the law by the court in the decision of the case, the question of error on the part of the trial court in its construction of the law governing this case can not be raised on appeal. First Nat. Bank of Chicago v. Northwestern Nat. Bank of Chicago, 29 N. E. Rep. 884 (Illinois Supreme Court).

O. A. McFARLAND, attorney for appellee.

OPINION OF THE COURT.

This was an action of forcible entry and detainer commenced before a justice of the peace and removed by appeal to the Circuit Court.

The case was tried by the court, a jury being waived by consent of parties, and the finding was for plaintiff. Judgment was entered accordingly, and the defendant, by further appeal, brings the record to this court.

There is no question that appellant entered upon the possession of the appellee without the consent of the latter, and by removing the fence and resetting the same, took pos-

session of the parcel in question. It is insisted, under the decision in *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, that thereby no cause of action arose to the appellee.

We are inclined to think the evidence shows such a forcible entry as to bring the case within the terms of our statute, and further, that there was no competent proof that appellant was the owner of the premises in dispute. So that in any proper view of the case the *Klein* case, *supra*, is not in point. *Gage v. Hampton*, 127 Ill. 87. The judgment will be affirmed.

Starne Coal Co. v. Ryan.

1. *Verdict Against the Weight of Testimony*.—Where the evidence fails to show that the injury in question was occasioned by the failure of the defendant to discharge its duty toward the plaintiff as an employe in respect to matters alleged in the declaration, there can be no recovery.

Memorandum.—Action for personal injuries. Appeal from a judgment in favor of the plaintiff rendered by the Circuit Court of Sangamon County; the Hon. JAMES H. CREIGHTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

The opinion states the case.

PALMERS & SHUTT, attorneys for appellant.

ORENDORFF & PATTON, attorneys for appellee.

OPINION OF THE COURT, *The Hon. Carroll C. Boggs, Judge*.

The appellee, while in the employ of the appellant company as a driver of coal cars on a track in its mine, was thrown from a car and injured. This is an appeal from a judgment in his favor because of such injuries.

The declaration contained three counts, the gravamen of

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the charge in each being that the appellant company negligently suffered a portion of the track of its road in the mine to become and remain in bad and unsafe repair and condition, and that by reason thereof the car upon which appellee was riding and driving left the track, causing the injuries complained of. It is not contended, either in the pleading, argument or proof, that the original construction of the track was defective or faulty, but the sole charge is an alleged failure to keep and maintain it in a good and safe condition.

The injury was received at a point where the track passed upon a somewhat descending grade through a rather dark entry. The appellee was driving a mule attached to a train of three cars, upon the front one of which he was riding. He came down the track at a rather rapid rate, the mule according to the testimony being in a "lope," when the car "jumped" the track and threw him against one of the props of the mine. He had been employed as a driver in this mine for some ten months and had been driving through the entry in which he was hurt for three weeks, during which time he passed and repassed frequently over the place where he was hurt, often passing there as he testifies fifteen to twenty times per day.

On the day that he was hurt he began work at 7:30 in the morning, passed the place in question seven times, and was passing it for the eighth time when the accident occurred.

His testimony is that he observed nothing wrong with the track during any of the trips prior to the last one, and he thinks there was nothing wrong before that; that the car jumped the track because the end of one of the rails of the track was turned in at the joint; that it could not have been in that condition when he passed there on the preceding trips, nor when another driver passed down over it in advance of him or that driver would have been thrown off. If this be correct, the displacement of the rail was such a sudden occurrence that a right of recovery could not be placed upon the idea that the appellant company should have discovered and remedied it in the short time which elapsed

between the trips made by the appellee. If a right of recovery exists it must be based upon some negligence of the appellant company by reason whereof the rail was displaced or not retained in its place.

The appellee contends that the tie, upon which the rail rested and to which it ought have been securely nailed, was defective and insufficient to hold the nails or the rail, and for that reason the rail was moved from its place at the end where it should join with the next rail. To support this contention and as the only evidence in its support the appellee sought to show that, immediately after he was injured and before the cars from which he fell were moved, a new tie was placed in the track.

From this, if true, it might reasonably be inferred that the track was unsafe with the ties already there, and that another tie was necessary to put the track in good and safe condition for use.

Upon this point, in behalf of the appellee, J. R. Burns testified that he saw Michael Lynch, appellant's road-master, putting a tie in the track immediately in the rear of the car that left the track, before such car was moved after the accident; and Michael Laudregan, also a witness for the appellee, testified that he saw Lynch there at the time with a tie in his hands and that he seemed to be working at the track. This was all the testimony favorable to the appellee on this point.

Lynch testified that he went at once to the place of the accident, found two cars off the track, replaced them, examined the track and the iron rails carefully to see that they were safe for use, and found them in good condition; that he had a wooden gauge used for ascertaining whether the track is level, and that he and Michael Hickey, who was assisting him, placed this gauge upon the track to see that it was level; that he had no tie there; did not find it necessary to use one, and did not use one; that the rail was not bent nor turned in at the joint, but that the track was in good and safe condition for use, and they began at once and continued hauling cars over it after the accident as before.

John Hickey, a coal miner, stated, as a witness, that he was with Lynch, assisting in the work, and remained with him until the cars were running again over the track; that he examined the track and the rails, testing the rail carefully with a hammer; that there was nothing wrong with either; that he and Lynch gauged the track and found it level; that no tie was removed, nor was a tie put in the track; that it was not necessary to put one in. That the cars were hoisted on the track and the track at once used for the passage of cars as before.

George Courdice, engineer of the mine, and Comack Cunningham, official state inspector of mines, officially examined the track at the place in question the next day after the appellee was injured. Both testified that the track and the rails were in good and safe condition; that they saw nothing to indicate that a tie had been placed in the track, and that if such had been done indications of the work would have been found; that there were no such indications. Both join in the opinion that no tie had been placed in the track.

The state inspector, with a lamp and hammer, examined carefully the rail and spikes by which it was attached to the ties, and could find nothing indicating that any change whatever had been made in the track, the rail or the ties.

We do not think that, under this evidence, the jury were warranted in finding that a tie was placed in the track, as claimed. Such a conclusion seems to us to be manifestly against the greater weight of the testimony.

It would appear more reasonable to conclude that Burns, in the darkness prevailing in the entry, mistook for a tie the gauge which Lynch and Hickey were using, than to conclude that both Lynch and Hickey willfully and knowingly testified falsely, and that they did break the ground and place a tie in the track, in such manner as to leave no discernible trace of the work.

If this view is correct, the evidence fails to show that the injury received by the appellee was occasioned by the failure of the appellant company to discharge its duty toward

the appellee as its employe in the respect charged in the declaration. In the absence of such proof there can be no recovery.

We do not think the instructions given by the court for the appellee open to the objection urged against them, but think appellant's motion for a new trial should have been granted for the reasons indicated. The judgment must be reversed and the cause remanded.

The People, etc., use of, etc. v. Ochiltree et al.

1. *Administrator's Bond—Statute of Limitations.*—In an action by the heirs of a deceased person against the administrator, and the sureties upon his official bond, it appeared that the bond was given in 1865, and that in 1872 the administrator made a report showing a balance in his hands of \$1,228.50, which was approved by the court, and distribution ordered. The administrator paid out, accordingly, to all the heirs a part of their shares, and all except two in full; that no further step was taken until October, 1891, when the administrator presented his final report and asked to be discharged, objections being filed, etc. The County Court found a balance remaining in his hands, and ordered him to pay over the same in thirty days. This he declined to do, and a suit upon his bond was the result. On the question whether an action could be maintained upon the bond for an account of moneys collected, but not reported, prior to the report of 1872, it was held that it could not, more than sixteen years, the statutory period of limitation, having elapsed since the making of the report in 1872.

2. *Limitations—Exemption of Trusts.*—The doctrine of exemption of trusts from the operation of the statute of limitations is not recognized in proceedings at law. Strictly speaking, a trust, in its technical sense, is known only in equity, and to exempt it from the bar of the statute it must be of the kind belonging exclusively to the jurisdiction of equity. Whenever a so-called trust matter is cognizable at law, it is not withdrawn from the operation of the statute, but is subject thereto.

Memorandum.—Action of debt on an administrator's bond. Appeal from a judgment in favor of the defendants rendered by the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANTS' STATEMENT OF THE CASE.

On November 20, 1865, defendants, John R. Ochiltree and Elizabeth Custer, were granted letters of administration upon the estate of Jacob M. Custer, deceased, by the County Court of Champaign County, and on that day, with defendant M. B. Custer and others, executed the bond in suit. At the August term, 1872, upon an *ex parte* report made by defendant Ochiltree, the same court ordered a distribution of personal assets of the estate among the heirs, but of this action of the court the heirs had no prior notice.

On October 5, 1891, Ochiltree filed his report in the same court, showing a compliance with this order of distribution, and asked to be discharged as administrator. Notice to the heirs of J. M. Custer was given by publication, and the cause set for hearing on November 23, 1891. On this day the heirs for whose use this suit is brought, appeared, filed objections to the report, and insisted that money unaccounted for had come into Ochiltree's hands. A trial was had and the court, finding that Ochiltree had received \$1,072.98 more than he had accounted for, an order was entered requiring him to pay to the heirs of said estate said sum within thirty days. Suit was brought upon the bond to enforce payment of this sum by the plaintiffs jointly, who are shown, by the evidence, to be the heirs of Jacob M. Custer. A failure to pay this sum of money is the breach of the bond set forth in the declaration, and upon which the trial was had, under a stipulation that all defenses might be made the same as if specially pleaded.

APPELLANTS' BRIEF.

Though this bond was executed more than ten years before the suit was brought, yet the statute of limitations has not barred this action. The statute only runs from the time when suit might have been brought upon the cause of action. *Dickerson v. Merriman*, 100 Ill. 342.

It is insisted that the statute of limitations applies to claims by heirs against administrators, for the reason that

the trust relation is not of the "kind belonging exclusively to the jurisdiction of a court of equity." The law is well settled that the county courts of Illinois, when adjusting the accounts of executors, administrators and guardians, act as courts of equity with plenary powers. *Wadsworth v. McConnell*, 104 Ill. 369; *Brandon v. Brown*, 106 Ill. 519; *Millard v. Harris*, 119 Ill. 185; *Estate of Corrington*, 124 Ill. 363; *Winslow v. Leland*, 128 Ill. 304.

J. O. CUNNINGHAM, attorney for appellants.

APPELLEES' BRIEF.

The right of action accrued to these parties at the time of making the report in August, 1872, and they can not bring a suit to recover the same now, because it is clearly barred by the statute of limitations.

"The action could have been brought when the breach first occurred, and a recovery then had upon the bond for the same amount as might have been recovered at any later period." *The Governor, etc. v. Woodworth*, 63 Ill. 254; *Scheel v. Eidman*, 77 Ill. 303.

In treating of the subject of the statute of limitations as applied to trusts, we call the attention of the court to the case of *The Governor v. Woodworth*, 63 Ill. 254. On page 258, at the bottom of the page, the court say: "There are trusts that are never brought within its operation, but they are usually such only as can be enforced and controlled in a court of equity. Such a trust must be direct, and belong exclusively to the jurisdiction of a court of equity, and the question must arise between the trustee and the *cestui que trust*. But where there is a remedy at law, that the statute may be interposed as a defense, is believed to be a principle uniformly recognized, and acted upon in courts of law."

In the case of *Hayward v. Gunn*, 82 Ill. 385, in passing upon the question of the application of the statute of limitations to trusts, the court say, on page 389: "To exempt a trust from the bar of the statute, it must be, first, a direct trust; second, it must be of the kind belonging exclusively

to the jurisdiction of a court of equity; and third, the question must arise between the trustee and the *cestui que trust*;" citing Angell on Limitations, Chap. 16, Sec. 166, and 63 Ill. 254.

J. L. RAY, attorney for appellees.

OPINION OF THE COURT.

This was an action of debt on a bond given by Ochiltree as administrator of the estate of Custer. The suit was against the administrator and his sureties for the use of the heirs of the decedent, jointly.

The case was tried by the Circuit Court, a jury being waived, and judgment was entered for the defendants. It appears that this bond was given on the 20th of November, 1865; that at the August term, 1872, of the County Court, the administrator presented his report, showing a balance in his hands of \$1,228.50, which was approved by the court and distribution thereof between the widow and heirs was thereupon ordered; that the administrator paid out accordingly to all the heirs a part of their shares, and all except two in full; that no further steps were taken until the October term, 1891, when the administrator presented his final report and asked to be discharged. In this report it was stated that his former reports had all been taken from the files, but that the record of the report of 1872 appeared in book 8, page 1892, of the County Court records, and the order of distribution thereon; that all debts and claims against the estate had been paid, and asking to be discharged; whereupon objections were filed on behalf of the heirs, and such proceedings were had that the County Court found the administrator was chargeable for moneys which he had received and failed to pay over on various accounts, in the total sum of \$1,072.98, and ordered him to pay the same to the heirs within thirty days.

Of this sum \$46 was due B. Custer and \$130.54 due W. C. Custer on the order of distribution of the August term, 1872.

It appeared that no money had been collected by the administrator since the making of his report in 1872.

The question presented is whether an action can now be maintained upon the bond against the principal and sureties for and on account of the moneys not reported, but collected, if ever, prior to the report of 1872.

The Circuit Court solved this in the negative, and we are inclined to agree with that conclusion. More than sixteen years elapsed from the making of the report in 1872 to the bringing of the present suit. If the administrator was ever in default he was so when he filed his report in 1872, and he was then liable to an action on his bond. He had collected the money and failed to account for it.

It is suggested, however, that the administrator was a trustee and as such precluded from the defense of the statute of limitations. This report of 1872 was equivalent to an open denial that any more was due—a repudiation of liability in respect to all matters not reported; and if the proceeding were in a court of equity, such a denial would require the heirs to proceed to assert their adverse rights. *Quayle v. Guild*, 91 Ill. 378.

But the doctrine of exemption of trusts from the operation of the statute of limitations is not recognized in proceedings at law.

Strictly speaking, a trust, in its technical sense, is known only in equity. To exempt a trust from the bar of the statute it must be of the kind belonging exclusively to the jurisdiction of equity. Whenever a so-called trust matter is cognizable at law it is not withdrawn from the operation of the statute but is subject thereto. *Angell on Limitations*, sections Nos. 166 and 178; *The Gov., etc., v. Woodworth et al.*, 63 Ill. 254; *Haywood v. Gunn*, 82 Ill. 385. The judgment will be affirmed.

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Damery v. Ferguson.

1. *Conveyance of Land—Reservation of Crops.*—Crops produced by annual planting and cultivation are in some instances deemed real es-

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tate, and in others personalty, depending largely upon the character and capacity in which the contracting parties claim them.

2. When the parties occupy the position of vendor and vendee, the rule is well established that growing crops not severed from the soil are real property and pass to the vendee unless reserved in the deed.

3. Matured crops, if severed from the soil, become personalty and do not pass by a deed, but crops not severed, whether ripe or unripe, pass to the vendee by the deed as being annexed to and forming a part of the freehold.

4. *Reservation by Verbal Agreement.*—Reservation by a verbal agreement entered into prior to the execution of the deed is not binding, and evidence thereof is not admissible.

Memorandum.—Replevin for crops reserved from a conveyance of the land by a verbal agreement. Appeal from a judgment for defendant rendered by the Circuit Court of Christian County; the Hon. JESSE J. PHILLIPS, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLEE'S STATEMENT OF THE CASE.

Appellant, Damery, in the spring of 1890, owned forty acres of land in Christian County, Ill., on which he planted and tilled the thirty-four acres of corn in question. On September 19, 1890, he sold the land to appellee, Ferguson (the corn standing thereon), and that day executed and delivered to Ferguson a general warranty deed, in the usual form, without reservation, for the land. The next day, September 20, 1890, Ferguson placed the deed on record, and about three or four o'clock in the afternoon of the same day went on the land, walked through the field of corn, husked some of it, went to the house on the land, which was occupied by a Mr. Travis (who had rented the same by the month and the four or five acres not in corn, from Damery), and gave Travis a notice, in writing, as follows: "I want you to take notice that I have this day taken possession of this forty acres of land, which I bought of Damery, and hereafter I am your landlord." Thereafter Travis paid the rent to Ferguson. Damery did not live on the land at any time in the season of 1890, but lived in Macon County, three miles away.

Damery replevied the corn from Ferguson while it was

still standing in the field, in November, 1890. The trial was by jury, and the court directed verdict for defendant. Plaintiff appeals and presents to this court two questions only, viz:

1st. Did the court err in sustaining defendant's objection to plaintiff's offer to prove what plaintiff claimed to be the verbal agreement, the day before the deed was made, when the land trade was agreed upon, as to the crop of corn in question?

2d. Did the court err in sustaining defendant's objection to plaintiff's offer to prove that at the time the deed was made the crop of corn was fully matured and no longer dependent upon the soil for sustenance?

APPELLANT'S BRIEF.

An examination of the authorities shows that the products of annual planting, or the *fructus industriæ*, are regarded both ways, sometimes as real, and sometimes as personal, estate, depending very much upon the character and capacity in which the respective parties claim them. There is no rule by which to determine, in every case, when they are to be deemed personal, and when real, estate; and the present case may, as we conceive, be decided either way without any violence of principle, and upon respectable authorities. *Reed v. Johnson*, 14 Ill. 257.

As between landlord and tenant, between debtor and creditor, and under our statute as between the executor and heir, growing crops are personal property. But between a trespasser and the owner of the soil, and a vendor and vendee, they are real estate. And it has been uniformly held, that by a conveyance of land, without a reservation in a deed, the crops and all things depending upon the soil for sustenance, belong to and pass with the land. After the crops have been matured, however, it is otherwise; but until they are matured, they constitute such an interest in the real estate as to bring them within the statute of frauds. *Powell v. Reish*, 41 Ill. 466.

A. McCASKILL & SON and FRANK P. DRENNAN, attorneys for appellant.

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APPELLEE'S BRIEF.

On a sale of land the writing is the only evidence of the contract, and a verbal reservation is not binding or even admissible in evidence, on trial as to the same. *Smith v. Price*, 39 Ill. 30; *Powell v. Rich*, 41 Ill. 466; *Purdy v. Rakestraw et al.*, 13 Ill. App. 480.

The execution and delivery of the deed carried with it the right to immediate possession. Sec. 9, Chap. 30, *Starr & Curtis' Stat. Ill.*, Vol. 1, p. 574; *Purdy v. Rakestraw et al.*, 13 Ill. App. 480.

Matured crop standing on the land is a part of the realty. *Sugden v. Beasley*, 9 Ill. App. 77; *Anderson v. Strauss*, 98 Ill. 485; *Smith v. Price*, 39 Ill. 28; *Carpenter v. Jones*, 63 Ill. 517; *Talbot v. Hill et al.*, 68 Ill. 106; *McGinnis v. Fernandes*, 135 Ill. 73; *Creel v. Kirkham*, 47 Ill. 349; *Talbot v. Hill et al.*, 68 Ill. 106; *Tripp v. Hasceig*, 20 Mich. 254.

A. THORNTON, J. E. HOGAN and J. G. DRENNAN, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

On the 19th of September, 1890, Damery conveyed to Ferguson a certain forty-acre tract of land in Christian County upon which there was standing ungathered the crop of corn produced that season. The deed was in the usual form, with full covenants of warranty and without reservation of the crop. Ferguson entered into possession under the deed.

Damery claimed that by verbal agreement entered into before the execution of the deed, the corn was reserved to him and did not pass with the land, and began an action of replevin to recover the corn. The corn, when the suit began, was still standing ungathered in the field.

Upon the trial the court refused to allow Damery to offer proof as to the alleged verbal reservation of the corn and also refused to admit proof offered by Damery, for the purpose of attempting to prove that the corn at the time the deed was made was fully matured and no longer depend-

ent upon the soil for sustenance. These rulings of the court are the only questions presented by the record.

Crops produced by annual planting and cultivation are in some instances deemed real estate and in others personalty, depending largely upon the character and capacity in which the contending parties claim them.

When the parties occupy the position of vendor and vendee the rule is well established in Illinois that growing crops unsevered from the soil are real estate and pass to the vendee by the deed, unless reserved in the deed. *Talbot v. Hill*, 68 Ill. 106.

Reservation by a verbal agreement entered into prior to the execution of the deed is not binding and evidence thereof is not admissible. *Smith v. Price*, 39 Ill. 28.

Matured crops, if severed from the soil, become personalty and do not pass by a deed, but crops not severed, whether ripe or unripe, pass, we think, to the vendee by the deed as being annexed to and forming a part of the freehold. 2 Blackstone's Com., 122, note 3; Broom's Legal Maxims, margin 354; *Killredge v. Woods*, 3 N. H. 503; *Heavilon v. Heavilon*, 29 Ind. 509; 4 Kent's Com., 468; *Tripp v. Hasceig*, 20 Mich. 254.

We are aware that an inference in favor of a contrary rule as to matured crops may be drawn from a remark of the court in *Powell v. Rich*, 41 Ill. 466. The question before the court in that case concerned growing crops. The remark is therefore but mere *dictum*, and opposed, as we think, to the great weight of authority and to the better reason. The rulings of the Circuit Court, in our opinion, were correct, and its judgment is affirmed.

Jones v. Gregory.

1. *Testimony and Evidence.*—There is a technical difference between the testimony and evidence; strictly speaking, the former relates only to the statement made by a witness under oath or affirmation, while the

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latter includes all that may be submitted to a jury, whether it be the statement of witnesses or contents of papers, documents or records, or the inspection of whatever the jury may be permitted to examine and consider during the trial. However, in the ordinary use of these terms they are often, if not usually, treated as synonymous, and properly so, according to standard lexicographers.

Memorandum.—Appeal from the Circuit Court of Vermilion County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

This suit was brought to recover the balance due on two promissory notes given by the defendant to the plaintiff on October 5, 1887: one due on or before March 1, 1889, for \$2,940, with interest at six per cent after March 1, 1888, the other given for \$2,000 due on or before March 1, 1890, with interest at six per cent after March 1, 1888. These two notes were given, together with one other note for \$2,000 due March 1, 1891, and another one for \$500, and a cash payment of \$1,500.

G. W. SALMANS and R. W. FISK, attorneys for appellant.

J. B. MANN and W. J. CALHOUN, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was an action of assumpsit upon two promissory notes which were given on account of the purchase money of a farm sold by plaintiff to defendant. The defense was that another promissory note for \$2,500, which defendant had paid to plaintiff, and which the plaintiff falsely claimed was also on account of the purchase of the same farm, was a forgery, and that it had been inadvertently paid.

The verdict was for plaintiff—and after overruling a motion for new trial the court rendered judgment accordingly for \$2,583.21. By the appeal of the defendant the record is brought to this court.

Upon the question of fact, while there is a conflict in

the evidence, we are entirely satisfied with the conclusion reached by the jury.

We think the weight of the evidence is not only not with the defendant, upon whom was the *onus* of showing that the said note was forged, but is with the plaintiff. It seems quite clear that the defendant's contention is unsupported.

It is unnecessary to discuss the proof in detail and we pass to the objections urged by appellant in regard to the instructions.

1st. That the first instruction given for plaintiff was erroneous in saying that the defendant must establish his defense by the preponderance of the *testimony*, thus ignoring the distinction between testimony and evidence, when a considerable part of the defendant's evidence consisted of written documents and circumstances.

Of course there is a technical difference between the terms testimony and evidence. Strictly speaking the former relates only to the statement made by a witness under oath or affirmation, while the latter includes all that may be submitted to the jury, whether it be the statement of witnesses or the contents of papers, documents or records, or the inspection of whatever the jury may be permitted to examine and consider during the trial.

However, in the ordinary use of the terms, they are often, if not usually, treated as synonymous—and properly so, according to standard lexicographers.

It is not at all probable, indeed we regard it as quite improbable, that the jury would have drawn any distinction between the meaning of the terms. In common parlance, they are understood to signify the same thing. In our opinion it would be wholly unreasonable to reverse the judgment upon the point thus made.

It is further urged as an objection to this instruction that it ignores the defense of set-off based on the claim that the tract of land contained ten acres less than was represented.

We have carefully examined the evidence and are unable to find anything upon which such defense can rest. It is apparent that the only issue before the jury was as to the

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validity of the note referred to. The defendant asked no instruction upon the subject of the supposed set-off, and in view of the proof, we think there was no error in ignoring it.

2d. It is objected that the court erred in modifying an instruction asked by the defendant. As asked the instruction read as follows: "If you believe from the evidence, after having heard it all, that the price of the land purchased was \$60 per acre, and that the whole price thereof was \$8,940, and that the cash payments and the notes given amounted to that sum, and that that amount has been paid by defendant to plaintiff, then you should find for defendant."

As modified it read thus:

"If you believe from the evidence, after having heard it all, that the *contract* price of the land purchased was \$60 per acre, and that the whole *contract* price thereof was \$8,940, *and that the \$2,500 paid note was not the defendant's note*, and that the cash payments and the notes given amounted to *said* sum of \$8,940, and that that amount has been paid by defendant to the plaintiff, then you should find for the defendant."

The modification is indicated by the words in italics. The changes thus made tended merely to make the meaning more definite and exact. We find no error therein. No other objections are presented. The judgment will be affirmed.

Chicago & Alton Railroad Co. v. Kerr.

1. *Railroad Company—Duty Toward its Employees.*—A railroad company owes to its employees the duty of using the uttermost care and vigilance consistent with the practical operation of its road in keeping its tracks in safe condition.

Memorandum.—Suit for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

The plaintiff charges that the defendant did not use proper care in constructing its road bed, nor in keeping the same in repair, but carelessly, negligently and unskillfully constructed and managed its road. That by and through its negligence its road bed, track, ties and rails became and were out of repair and in dangerous condition at a place about three miles south of Jacksonville, and the same was dangerous to the lives of train men and passengers. The defendant well knew and might have known that its road bed at the place aforesaid was unskillfully constructed and out of repair, etc. That on May 9, 1890, plaintiff, as a locomotive fireman on train, while in the exercise of due care, and being ignorant of the defective condition of the road bed, was thrown from the engine and received severe injuries, etc.

APPELLANT'S BRIEF.

Appellant owed appellee only the duty of exercising reasonable care to have its track and appliances in good order and condition, and it did not owe to appellee that degree of care which is expressed in the instruction. The duty to exercise reasonable care falls far short of that degree of care which is expressed in the words "To do all that human care, vigilance and foresight can do." That degree of care would have required, perhaps, that a man should be stationed at every rail. Human foresight might have done that. *Wabash, St. Louis and Pacific Railway Company v. Fenton*, 12 Brad. 417; *C., B. & Q. R. Co. v. Abend*, 7 Brad. 130.

"The degree of care and prudence which a master is bound, as between himself and his employe, to exercise in providing tools, machinery and appliances for transacting the business of the employment, is that reasonable care and prudence in selecting and ordering what he requires in his business which every prudent man is expected to employ in providing himself with the conveniences of his occupation." *Gates v. S. M. R. Co.*, 28 Minn. 110.

"As between a railroad company and its employes, the

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railroad company is required to exercise reasonable and ordinary care and diligence, and only such, in furnishing to its employes reasonably safe machinery and instrumentalities for the operation of its railroad." *A. T. & S. F. R. Co. v. Wagner*, 21 Am. & Eng. R. R. Cases, 63.

WM. BROWN, attorney for appellant.

WILLIAMS & CAPEN, of counsel.

APPELLEE'S BRIEF.

In an early case it was held to be the duty of railroad companies to keep their road and works and all portions of the track in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passengers or servants or others. *C. & N. W. R. R. Co. v. Swett*, 45 Ill. 203.

Such an obligation is permanent, and can not be avoided by delegating the power to look after these things to other employes. The undertaking with their servants is direct that they will perform these obligations. *C. & N. W. R. R. Co. v. Swett*, 45 Ill. 197; *C. & N. W. R. R. Co. v. Jackson*, 55 Ill. 496.

Servants have a right to assume that the master will perform his duty in that regard. *C. & N. W. R. R. Co. v. Swett*, 45 Ill. 197; *I. C. R. R. Co. v. Welch*, 52 Ill. 186; *Perry v. Ricketts*, 55 Ill. 234; *U. S. R. S. Co. v. Wilder*, 116 Ill. 100.

The first statement of the rule above, 45 Ill. 203, has been modified to some extent, but the rule as modified holds the company to the highest degree of diligence consistent with the practical operation of its road, and this is the rule as between the company and its servants. The rule applies to the relation of master and servant as well as carrier and passenger. Our court has made no distinction. *P. C. & St. L. R. R. Co. v. Thompson*, 56 Ill. 138; *T. P. & W. R. R. Co. v. Conroy*, 61 Ill. 163; *C. & A. R. R. Co. v. Platt*, 89 Ill. 141; *T. P. & W. R. R. Co. v. Conroy*, 68 Ill. 560.

EDWARD BARRY and JOHN E. POLLOCK, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The appellant company was, on the 8th day of May, 1890, improving or repairing the track of its road at a point about three miles south of Jacksonville. We think the evidence establishes the fact that at the close of that day the track at this point was left in an unsafe and dangerous condition. At 9 o'clock of the night of the same day the division superintendent of the appellant company while on one of the appellant's trains passed over the place in question and his attention was called to the imperfect condition of the track. He so testified, and stated further that the train rolled or rocked to such an extent that he, on arriving at Jacksonville about fifteen minutes after, directed a message to be sent to the train master at Roodhouse, instructing him to notify those in charge of trains to run slowly over that part of the road.

The appellee was in appellant's employ as a fireman, and acting in that capacity, left Roodhouse at about one o'clock of the same night on an engine drawing meat train No. 75.

The conductor of this train received orders concerning the operation of his train from the operator at Roodhouse, but was not warned of nor did he receive any order relating to the defective or unsafe condition of the track. This train passed over the dangerous point at a high, but not unusual rate of speed, and by reason of the imperfect condition of the track the engine rolled and lurched from side to side so violently that the appellee was thrown with great force from his place in the engine to and upon the ground, and received injuries for which he recovered a judgment in this case, in the Circuit Court, against the appellant company, in the sum of \$3,250. This is an appeal from that judgment.

As before said it is abundantly proven that the track was imperfect, rough and unsafe. This appellant's division superintendent knew, possibly in time to have caused it to be repaired and made safe and certainly in ample time to have

warned those in control of other trains of the danger. He attempted ineffectually to give warning through the train dispatcher. Whether the operator at Jacksonville neglected to send the message as directed by the superintendent, or whether the train dispatcher neglected to obey it, does not appear. The failure and neglect of either was the failure and neglect of the appellant.

Rule No. 35 of the appellant company is as follows: "A stationary red flag by day or red light by night denotes that the track is impassable, and trains must stop at once and not proceed until it is known to be clear. A red flag with a white center by day or a red and white lamp placed close together at night denotes that the track is imperfect, and must be run over with great caution.

This rule was in force at the time of the accident and the division superintendent testified that it was the duty of any officer of the road to display the signals required by the rule whenever the condition of the track was such as to make that course necessary. Compliance with this rule was easy and convenient of accomplishment and would, beyond any reasonable doubt, have secured the appellee from injury.

We think that in the exercise of ordinary prudence and diligence the signals required by this rule should have been displayed.

The appellant company owed to the appellee as one of its employes, the duty of using the uttermost care and vigilance consistent with the practical operation of the road, in keeping its tracks in safe condition. *P. C. & St. L. R. R. Co. v. Thompson*, 56 Ill. 138; *T. P. & W. R. R. v. Conroy*, 61 Ill. 163; same v. same, 68 Ill. 560; *C. & A. R. R. v. Platt*, 89 Ill. 141.

In *T. P. & W. R. R. v. Conroy*, 68 Ill. 560, which was an action by an employe against the railroad company, it is said: "The duty owing by a railroad company to the public *as well as those in their employment* is that the road and its appurtenances shall be constructed of the best material, having in view the business to be done upon it. In their construction they should equal those of the best roads doing an

equal amount of business, and the utmost care and vigilance should be bestowed upon them in keeping them in safe condition."

"The law will not allow them to be out of repair an hour longer than the highest degree of diligence requires. And further, it is their duty to keep a sufficient force at command and of capacity sufficient to discover defects and apply the remedy."

The instructions given for the appellee are in harmony with the views thus expressed and are not open to the objection sought to be preferred against them. Tested by these rules the appellant failed to discharge its duty in leaving the track in such a dangerous condition, and failed again in not taking steps to put it in safe condition when its division superintendent received actual knowledge of its defects, and failed further in not giving warning by the signals required by its own rules.

We do not feel as well satisfied as we would like to be as to the extent or permanency of the injuries of the appellee. The testimony of the medical experts is conflicting and not entirely satisfactory; but we are not warranted in saying that upon this point the jury were manifestly wrong or that there is not sufficient evidence in the record to support the finding. The judgment must be and is affirmed.

Howland et al. v. White.

1. *Unmatured Rent Notes Surrendered upon a Forfeiture of the Lease.*—On the 27th day of March, 1889, Peter and Julius Keister, tenants in common of certain premises, joined in a lease to John P. White, by which Peter leased his half for one year and Julius his half for two years. In payment of the rent to Julius, White made and delivered eight promissory notes, each for \$116.66, with Minerva White as security. The first note fell due March 27, 1891, the next September 27, 1891, and the others ninety days apart thereafter. On April 20, 1889, Julius assigned the notes and lease to Johnson & Knight, who, seven days later assigned the lease and transferred the notes to S. W. Kinkaid. On or

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66	283
48	236
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about June 1, 1891, Minerva White, the defendant, purchased the notes and lease of Kinkaid, who assigned the lease to her. On December 10, 1889, White assigned the lease, which had been executed in duplicate, to Albert and John Howland, and they entered into possession of the premises. One of the notes given by White, with Minerva White as security, to Julius Keister, matured March 27, 1891, and not being paid, Minerva White gave the Howlands notice of her ownership of the note and lease, demanded payment, and in default, declared the lease terminated and demanded possession of the undivided half of the premises, etc. Payment not being made, she began this action. The Howlands claimed that because Minerva White did not surrender and deliver to them all the rent notes held by her excepting the one on which the forfeiture was declared, according to a provision of the lease to that effect, her action was not sufficient to terminate the lease and create a forfeiture. *It was held*, that the clause of the lease did not expressly provide that all of the unmatured rent notes should be surrendered in case of a forfeiture; that the notes not having been given by the Howlands, they had no right to them, and were under no obligation to pay them if they were not delivered up.

2. *Security—Right to Purchase the Note.*—A security on a note may lawfully purchase the note, and as a holder, keep it alive as an indemnity against loss because of her suretyship.

3. *Forfeiture of a Lease for Non-Payment of Rent.*—The common law rule that to create the forfeiture of a lease for the non-payment of rent, a demand for payment must be made upon the premises, is dispensed with by necessary implication arising from our statutes.

4. *Attornment.*—The enactment of Sec. 14, Chap. 80, R. S. (Starr & Curtis, 1497), dispenses with the necessity of an attornment, and abrogates the rule announced in *Fisher v. Deering*, 60 Ill. 114.

5. *Assignment of Leases—Attornment.*—All leases, except leases at will, may be assigned if there is no restriction in the lease itself, and the assignee of the lease is granted, by Sec. 14, Chap. 80, R. S., the same remedies, by action or otherwise, for the non-performance of any agreement in the lease for the recovery of rent or other cause of forfeiture, as the lessor might have had while the owner of the lease. Attornment is unnecessary to vest the assignee of a lease with the full rights of the assignor—the original lessor.

Memorandum.—Action of forcible entry and detainer. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

STATEMENT OF FACTS BY THE COURT.

March 27, 1889, Peter Keister and Julius Keister, the owners of the premises in controversy, executed under their

hands and seals, a lease of the premises to one John P. White, for the term of one year, and by the same instrument Julius Keister leased his undivided one-half interest in the premises to White for two years longer. In payment for the rent of the interest of Julius for such two years, J. R. White executed and delivered to Julius his eight notes, signed by himself, and also by the appellee as his surety, each note being for \$116.66, the first of which fell due March 27, 1891, the next September 27, 1891, and the others each falling due ninety days apart thereafter. These notes are fully set out in the lease.

April 20, 1889, Julius Keister assigned the notes and the lease to Johnson & Knight, who, on the 27th of April, 1889, transferred the notes and assigned the lease to O. W. Kinkaid.

In May, or the first of June, 1891, the appellee, through her agent, Mr. Woodcock, purchased the notes and lease of Kinkaid, who assigned the lease to her.

Appellants claim that appellee did not purchase the notes, but paid them off; but we are satisfied that she in fact bought the notes and the lease.

J. R. White, the lessee, on the 10th December, 1889, assigned the lease, which had been executed in duplicate, to appellants, who entered into possession under it. One of the notes thus given by White and the appellee to Julius Keister fell due on the 27th day of March, 1891, and not being paid, the appellee, on the 12th day of June, 1891, gave appellants written notice of her ownership of the lease and notes, and of the fact this note was past due, and demanded immediate payment thereof, and in default of payment demanded possession of an undivided one half of the premises within five days. This notice was served upon appellants and John P. White by delivery of a copy on the 12th day of June, 1891. Payment not being made nor possession given, the appellee, on the 22d day of June, 1891, began, before a justice of the peace, this action in forcible detainer to recover such possession. Judgment before the justice in appellee's favor followed, from which appellants appealed to

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the Circuit Court of Macon County, where, upon a hearing before the court without a jury, a judgment was again rendered for the appellee, to reverse which this appeal is prosecuted. The appellants claim that they purchased the lease from J. R. White without notice of any assignment by the lessors; that they received an assignment of the copy or duplicate lease held by J. R. White upon which there was no other indorsement; that J. R. White told them he had paid all the notes given by him, and that thereupon they executed and delivered to J. R. White their notes for the same amounts and due at the same time as the notes that White had given to Julius Keister. That White assigned such notes to Julius Keister, who discounted them to the appellants, the makers, and that such notes are fully paid and discharged.

Clause of the lease referred to in the opinion of the court:

Sixth. It is hereby expressly agreed by and between the parties hereto, that in case of default in the payment of any of said notes at the time the same becomes due and for a period of fifteen days thereafter, the said first parties reserve the right to declare the contract terminated, and said second party hereby agrees to give possession of said premises to said first parties within five days of such termination, without any claim for damages for such termination, and in such case all of the unpaid notes shall be returned to said second party except the one he fails to meet when due.

APPELLANTS' BRIEF.

At common law the non-payment of rent when due would not work a forfeiture unless lawful demand was made of the precise sum due, on the very day it became due, at a convenient hour before sunset, upon the premises, at the most conspicuous place, unless some other place was named in the lease. *Chadwick v. Parker*, 44 Ill. 326; *Chapman et al. v. Kirby*, 49 Ill. 211; *Woodward v. Cone*, 73 Ill. 241; *Gear's Landlord and Tenant*, Sec. 195.

While our statute dispenses with the necessity of making the common law demand of the rent on the very day it falls due, it does not dispense with the common law requirement of a demand of rent upon the premises before declaring a

forfeiture of the lease. *Chadwick v. Parker*, 44 Ill. 326; *Dodge v. Wright*, 48 Ill. 382.

A party insisting on a forfeiture must show that he is entitled to it. It is a harsh manner of terminating a contract, and he who insists on it must be held strictly within the limits of the authority which gives the right. *Palmer v. Ford*, 70 Ill. 369; *Chapman et al. v. Kirby*, 49 Ill. 211; *Chadwick v. Parker*, 44 Ill. 326; *Cheney v. Bonnell*, 58 Ill. 268.

BUCKINGHAM & SCHROLL, attorneys for appellants.

APPELLEE'S BRIEF.

The law of attornment does not apply in a forcible detainer case, and the assignee of a tenant is not entitled to notice, but must take notice of the landlord's rights and be ready to deliver the possession if he forfeits the lease. *Fisher v. Smith*, 48 Ill. 184; *Merrin v. Lewis*, 90 Ill. 505; Vol. 12 of American and English Encyclopedia of Law, 1029.

I. D. WALKER, attorney for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge*.

It is first contended that the notice given by the appellee was not sufficient to terminate the lease and create a forfeiture. The grounds of such supposed deficiency are thus stated by counsel:

1. Because there is no demand of rent due upon the premises before declaring a forfeiture.

2. Because appellee did not turn over to appellants or offer to deliver up to them all rent notes held by her, except the one on which the forfeiture was declared, according to a provision of the lease to that effect.

The paper served upon the appellant advised them that appellee was the owner and holder of a rent note more than two months past due and unpaid; declared the lease terminated and demanded immediate payment of the unpaid rent. Had the notice contained nothing further, it might have been regarded as an attempt to declare and enforce a forfeiture

solely under the provisions of the lease and without regard to either the common law or statutory requirements concerning such forfeitures; but the notice proceeded to require the surrender of the premises, only in case appellants failed to pay the rent note within five days thereafter.

When all that is contained in the notice is considered together, it is simply a demand for payment of rent, with a declaration of forfeiture and demand for possession if such payment is not made in five days, and is in compliance with Sec. 8, Chap. 80, R. S., which authorizes a forfeiture in such state of case.

The common law rule that to create the forfeiture of a lease for non-payment of rent, a demand for payment must be made upon the premises, or some part thereof, is, we think, dispensed with by necessary implication arising from our statutes. *Woodward v. Cone*, 73 Ill. 24. It is true that in the case cited it is distinctly said that ten days' notice to quit is essential to create a forfeiture. Such was the requirement of the statutes (1865) then in force, but this has been changed by the 8th section of Chap. 80 of our statutes now in force and governing this case. Only five days' notice is now required if rent be due and unpaid.

While it is true that the notice in the case at bar contains a demand for immediate payment, it is further true that the time fixed for such payment, to avoid the surrender of the premises, is placed at five days. This is sufficient mention of the time within which payment may be made under the statute. *Farnam v. Holman*, 90 Ill. 312.

Nor do we think the second alleged ground of objection is well taken. The sixth clause of the lease does expressly provide that all of the unmatured rent notes shall be surrendered in case of a forfeiture.

The unmatured notes are not, however, notes given by the appellants; upon the contrary, are notes executed by the appellee and J. R. White.

We are unable to perceive any reason why the appellee should be called upon to surrender up these notes to the appellants.

The appellants have no right to them; nor are they under any obligation to pay them if not delivered up. We think the appellee had the right to retain them, at least as against all persons other than J. R. White.

It is urged that the appellee has no cause of action as holder of the notes because the notes were extinguished by the payment of them by her. The proof, we think, is that the appellee did not pay the notes but purchased them, and also the lease, as an indemnity against loss because of her suretyship for J. R. White.

This she might lawfully do, and keep them alive and not discharged as by payment, though she, as surety, was one of the payors of the notes. Brandt on Suretyship, Sec. 371; Allen v. Powell, 108 Ill. 584.

It is thought the appellee ought not to recover because the appellants had no notice of her claim for rent or of the assignment of the notes and lease to her at the time they paid the notes given by them to J. R. White for the rents.

The appellants obtained whatever interest they have in the premises by a lease, in the body of which is fully set out the fact that these notes were given for rents specified in the lease and constituted the consideration thereof. There the notes are also fully described. The appellants stand charged with notice of all that is thus contained in that lease.

Counsel upon one side argue that the appellee and J. R. White, her husband, are perpetrating a wrong upon the appellants which will, if this judgment is affirmed, result in forcing appellants to lose the amount paid by them upon the notes given by them to J. R. White upon the supposition that White had paid the notes mentioned in the lease, while counsel upon the other side argue that the appellants and J. R. White confederated together and are acting in concert in endeavoring to defeat the notes purchased and owned by her.

The record is without evidence in support of either of these views, though one or the other is doubtless true. We are powerless to correct or prevent, by any ruling upon the

points presented by the record, the consummation of the wrong that it is apparent has been or attempted to be perpetrated by one or the other of these parties to this cause.

The parties respectively have chosen to prosecute and defend upon legal points, and though each cries fraud against the other, neither presents proof in support of the charge.

A recovery, it is said, can not be upheld because there was no attornment to appellee by the appellants. We think that the enactment of Sec. 14, Chap. 80 R. S. (Starr & Curtis' Statutes, 1497) dispensed with the necessity of an attornment and abrogated the rule announced in *Fisher v. Deering*, 60 Ill. 114.

All leases except leases at will may be assigned if there is no restriction in the lease itself (12 Amer. & Eng. Ency. of Law, 1029), and the assignee of a lease is granted by the said Sec. 14 of Chap. 80, R. S., the same remedies, by action or otherwise, for the non-performance of any agreement in the lease for the recovery of rent or other cause of forfeiture, as the lessor might have had, while the owner of the lease or attornment must, we think, be hereafter deemed unnecessary to vest the assignee of a lease with the full rights of his assignor—the original lessor.

The finding, ruling and judgment of the Circuit Court are, we think, correct, and must be and are affirmed.

Chicago & Eastern Illinois R. Co. v. Kneirim, Administratrix, etc.

48	243
152	458

1. *Fellow-Servants*—A yard switchman, employed by a railroad company to assist in switching cars, his duties being to couple and uncouple cars and to manage the brakes upon cars which were being switched in distributing cars about the yard, and the car inspector, are not fellow-servants within the rule as laid down in this State.

2. *Instructions—Refusal to Give on Questions Not Arising in the Case.*—It is not error to refuse an instruction upon a question which does not arise in the case.

3. *Damages \$5,000 Not Excessive.*—When a person thirty-one years old, in good health, his labor furnishing the only means of support for his wife and three children, is killed while in the employ of a railroad company under circumstances which entitle his representatives to recover, \$5,000 damages are not excessive.

Memorandum.—Action for personal injuries. Appeal from a judgment in favor of appellee, rendered by the Circuit Court of Vermilion County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

STATEMENT OF THE CASE BY THE COURT.

On April 1, 1890, George H. Kneirim, appellee's intestate, was killed by being run over by a car of appellant in the yards at Danville Junction. He was a yard switchman employed by appellant to assist in switching cars in the yards. His duties were to couple and uncouple cars, and also to manage the brakes upon the cars which were being switched. About 8 o'clock on the night in question he was engaged with other servants of appellant in distributing cars about the yards. He got upon a section of the train and rode thereon a distance of a block or more, when for some reason he fell off and was run over by the car upon which he was riding. When found, the car which ran over him was without a wheel upon the brake-staff, and the threads of the screw upon which the nut or tap turned were found to be rusty, and at the side of the track, in the ditch, was a brake-wheel. The train, containing the car in question, came to the yards from the south some time that evening, and was inspected by train inspectors employed in the yard by appellant, and who had been so employed for several years, who were well known to the deceased, he having worked in the same yards several years, and having frequently handled cars which had passed their inspection. When last seen prior to the accident, deceased was standing on the alleged defective car beside the brake with his lantern down on the platform. The car was loaded with sand and came from a sand-pit down the road. The plaintiff recovered \$5,000.

W. H. LYFORD and J. B. MANN, attorneys for appellant.

M. W. THOMPSON and G. W. SALMANS, attorneys for appellee.

OPINION OF THE COURT.

It is first urged that the court erred in not instructing the jury to find for defendant upon the case made by the plaintiff's proof.

We are of opinion there was no such want of evidence as to make it the duty of the court to take the case from the jury.

It is also urged that the court erred in its definition of the term fellow-servants, as found in the third instruction given for the plaintiff and in the fifth for defendant, as modified by the court, and the assumption contained in the fifth for plaintiff that the car inspector was not a fellow-servant with the deceased.

The question as to fellow-servants can arise only as to the relations of the deceased and the car inspector, as it is apparent that the latter is the only person whose negligence (aside from that imputable to the deceased, if any,) is involved.

We are clearly of opinion that they were not fellow-servants within the rule as laid down and understood in this State; that the jury had no warrant in the evidence to find against the plaintiff on that ground, and therefore upon the authority of *C. & A. R. R. v. Hoyt*, 122 Ill. 369, it is not material to inquire whether the court accurately stated the rule of law on this branch of the case.

In that case the court said: "Assuming, then, that the instruction as asked states the law in relation to fellow-servants accurately, the question arises, was the defendant prejudiced by the refusal of the court to give it. That involves the inquiry whether it is applicable to the facts, or, what is the same thing, does the question whether the plaintiff and the engine driver were fellow-servants, fairly arise in the case."

It would be palpably absurd to reverse the judgment on account of error in the definition of fellow-servants, when this court, upon consideration of the evidence, feels convinced and constrained to hold that there is no question of fellow-servants fairly arising in the case.

It is urged, the plaintiff's fifth instruction is also bad, because it limits the requirement of care on the part of deceased to the time of the accident, citing certain cases where such a limitation was held fatal, as in the Halsey case, 133 Ill. 248, and others like it.

Where, as in the Halsey case, one goes upon the track of a railroad without using care to observe the approach of trains, it is not sufficient that after getting there, the danger then being upon him, he uses all the care possible. In such a case he was not careful in coming upon the track. His fault was in unnecessarily and carelessly taking a position where no amount of care possible for him to exercise would save him.

This case is not analogous. The deceased had no opportunity to ascertain the condition of the brake until he was on the car and until he was about to set it.

Possibly he had time to ascertain the defect before applying his force to the wheel—and possibly not. It was dark and there was but little, if any, time for examination. The care which he was bound to exercise would begin when he got to the brake, and therefore the expression "and that the deceased was using due care and caution for his own safety at the time," was not inapt or inaccurate. We think there was no error in this respect.

It is urged further that the fourth instruction for plaintiff, that if the jury should find for plaintiff, they should assess the damages at whatever sum they "should deem just and reasonable from all the evidence in the case, not exceeding the amount claimed in the declaration," was erroneous because it left the jury free to assess damages arising from sorrow, loss of society, etc., if they thought it just and reasonable to do so.

But, referring to the declaration, the jury would see that

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the only claim made therein was for a pecuniary loss by reason of the death of the deceased, who, in his lifetime, earned a certain monthly stipend, which he used and applied to the maintenance and support of his wife and children.

While it is true that in this action nothing can be recovered for *solatium*, yet there is no claim for anything of the sort in the declaration, nor is it so intimated in the instruction which pointedly referred to the declaration. It would have been more satisfactory had the instruction stated distinctly and directly the elements which might be considered by the jury in assessing damages, and if the defendant apprehended the jury would go astray, it would have been very easy to obtain a supplementary instruction so framed as to exclude any mistake in that regard.

The deceased was thirty-one years old, in good health, and his labor furnished the only means of support for his wife and three children. It is not to be supposed that an instruction that the pecuniary loss only could be regarded would have led the jury to assess the damages lower than they did. At any rate, if the defendant chose to leave the matter as it was left by plaintiff's instruction, which, taken in connection with the basis of recovery laid in the declaration, was technically correct, we think no complaint can now be made, in view of the evidence. The damages can not be regarded as excessive.

We find no error of substance and must, therefore, affirm the judgment.

City of Jacksonville v. Doan.

1. *Instructions—Nuisances.*—In an action to recover damages resulting from the discharge of offensive matter from a sewer into a creek, an instruction which states that if there were obstructions in the creek below the mouth of the sewer, and that such obstructions caused offensive matter to remain in said creek and caused damage to the plaintiff, etc., is erroneous because it is not limited to the obstructions on the plaintiff's premises, or such as were made by him or were under his control.

2. *Damages, Speculation, etc.*—A recovery is denied only when speculation or conjecture has to be employed to determine whether the injury is the result of the wrongful acts charged in the declaration or from some other cause.

3. *Nuisances—Distinct Damages.*—If the principle that a person can not recover for damages resulting from the offensive discharge from a sewer, unless it appears that he has suffered damage different and distinct from that sustained by the general public, is conceded to be in the abstract correct, it has no application to a case where sewage is discharged in the immediate vicinity of the plaintiff's dwelling, and the effluvia permeates his dwelling, nauseating and sickening its inmates. Such an injury, and the consequent damages, are special to the plaintiff, and entirely distinct from what the public may have suffered in a general way from the same cause.

Memorandum.—Action for damages resulting from offensive discharges from a sewer. Appeal from a judgment for \$260 in favor of the plaintiff, rendered by the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLEE'S STATEMENT OF THE CASE.

This suit is for damages resulting from the act of the city of Jacksonville, in discharging from its sewers large quantities of sewage into Mauvaisterre creek and then upon the premises of appellee, in such proximity to his dwelling house that the stench arising from the putrid mass filled his house and premises and destroyed the comfort and menaced the health of himself and family.

M. T. LAYMAN, OWEN P. THOMPSON and F. H. ROWE,
attorneys for appellant.

JOHN A. BELLATTI, counsel for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This action was brought by the appellee to recover damages resulting from the discharge of offensive matter from a sewer of the city into Mauvaisterre creek, in the immediate vicinity of the dwelling house of the appellee, from which arose unwholesome and foul odors and stench, permeating and infecting appellee's home, rendering it uncomfortable,

and endangering the health of himself and his family. A trial before a jury resulted in a verdict and judgment for the appellee in the sum of \$260, from which this appeal.

The action of the court in refusing certain instructions asked by the appellant constitutes the ground of alleged errors. The first of these refused instructions is as follows:

“That if the jury believe from the evidence that there were obstructions in the Mauvaisterre creek below the mouth of Church street sewer, and if they believe that such obstructions caused offensive matter to remain in said creek and cause damage to the plaintiff—if they believe that he received injury, then the plaintiff can not recover from the city of Jacksonville any damage that may have been caused by such obstructions.”

Appellant's counsel contend that there was evidence tending to show that on appellee's land, below the mouth of the sewer, a fence had been constructed across the bed of the creek, and that drift wood collected in the creek there on appellee's premises, which stopped the flow of water, and prevented, or assisted in preventing, the escape of the sewage, and insist that this instruction should have been given, because, as they say, “A plaintiff can not cause or materially contribute to an injury to himself and then make another liable for such injury.” There is evidence tending to show (and indeed a preponderance, as we think,) that the fence referred to was not upon the premises of the appellee, nor under his control, and that he had no part in its construction. In such state of case, the instruction ought not to have been given, because it is not limited to obstructions on the premises of appellee—not to such as were made by him or were under his control; but rather invited the jury to wander beyond the evidence to find a ground of defense.

The question of whether a city is to be held liable if sewage, which would otherwise pass away with the waters of a stream, is obstructed and detained by the act of persons other than the person injured thereby, does not arise under the pleadings and proof in this case. Complaint is made that the court refused to give the following instruction:

"The court instructs the jury that the plaintiff can not recover in this case for speculative damages, and if speculation or conjecture is resorted to for the purpose of determining whether the alleged injury results from the wrongful act of the defendant, or from some other cause, then the plaintiff can not recover for such injury."

It is abstractly true that if mere speculation and conjecture *must be* resorted to in order to determine whether an injury results from the act complained of, or from some other cause, damages can not be allowed for such injury. That is to say, a recovery can be had only when it is shown that the injury flows from the wrongful act as the direct result thereof.

This principle is clearly and repeatedly stated in other instructions given to the jury on behalf of the appellant, and by the sixth instruction also, given for the city, the jury were expressly told that they must be governed solely by the evidence, and that they had no right to indulge in speculation or conjecture not supported by the evidence. Moreover, it is not strictly accurate to say that a plaintiff can not recover "if" speculation or conjecture is resorted to. Recovery is only denied when speculation or conjecture "has to be" employed, to determine whether the injury is the result of the wrongful acts charged in the declaration, or from some other cause. To this effect, *I. B. & W. R. R. v. Birney*, 71 Ill. 391.

Complaint is made of the refusal of the court to give two other instructions asked by the appellant, the effect of each being that no recovery could be had unless it appeared that the appellee suffered damages different and distinct from the damage sustained by the general public. If the principle thus announced is conceded to be, in the abstract, correct, as to which we express no opinion, yet it was not error to refuse these instructions. The declaration and proof offered in its support is that the sewage was discharged in the immediate vicinity of the appellee's home, where he and his family resided, and that the effluvia therefrom, by reason of the proximity of the mouth of the sewer,

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reached and permeated his dwelling, and nauseated and sickened its inmates. Such an injury, and the consequent damages, were special to the appellee, and entirely distinct and separate from what the public may have suffered in a general way, though from the same cause.

There was no occasion for advising the jury as to a rule or principle of law that had no application to the case in hand.

We do not think the alleged errors well assigned, but believe the judgment is just and lawful, and should be and is affirmed.

Chicago, Burlington & Quincy R. R. Co. v. Dannel.

1. *Railroads—Injuries to Domestic Animals—Negligence.*—In an action to recover damages for the killing of domestic animals which, escaping from the plaintiff's premises, were upon the defendant's track, it appeared that the company had fenced its track as the law required and provided a gate for the use of the plaintiff at his farm crossing. The gate was made to slide between posts at one end, but the plaintiff changed it so that it hung upon hinges, and at the time of the injury complained of, it was so fastened that stock might push it open by rubbing against it. From the plaintiff's own testimony it appeared that while the gate was closed and fastened an hour or two before the injury occurred, it was found open shortly after. This appearing, *it was held* that the animals got upon the track through no negligence of the company, and that the plaintiff could not recover.

Memorandum.—Action for injuries to domestic animals. Appeal from the County Court of Jersey County; the Hon. ALLEN M. SLATEN, County Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

The opinion of the court states the case.

SWEENEY & WALKER, attorneys for appellant.

O. F. PRICE and THOS. F. FERNS, counsel.

HAMILTON & LEACH, attorneys for appellee.

OPINION OF THE COURT.

The appellee recovered a judgment against appellant for \$400, for the value of four horses and a bull injured by the appellant's train.

The declaration contained two counts: 1st. For negligence in not building and maintaining a proper fence, whereby the animals came on the track. 2d. For willfully and negligently driving the engine upon the stock, etc.

The jury, by special finding of facts submitted at suggestion of plaintiff, determined that the allegations of the first count were not sustained by the proof, and it is clear there was no sufficient evidence to support that count. The company had fenced the track as the law requires, and had provided a gate for the use of the plaintiff at a farm crossing. This gate, which was made to slide between posts at one end, had been changed by plaintiff so as to hang upon hinges, to suit his own convenience, and was so fastened that stock might push it open by rubbing against it. From the plaintiff's own testimony, it appears that while it was closed and fastened an hour or two before the accident, it was found open shortly after. The stock, then, got upon the track through no fault of the company, and the question is whether the allegation that the defendant, by its agents, willfully and negligently ran the engine upon and against the stock, is sustained by the proof.

We have no hesitation in saying that it is not. The evidence offered by plaintiff wholly failed to sustain the charge. It is only by inference drawn from the position of the animals when found that this is attempted.

It appears that they were in a cut just beyond an embankment. The accident occurred in the night time, and aside from the speed of the train, which some of the witnesses think was unusual, we find nothing tending to place the train men under the charge of negligence. The speed, we are satisfied, was not unreasonable, and probably not unusual. The affirmative evidence of the train men shows that the

Calef v. Parsons.

animals were not discovered in time to prevent the injury, although a proper lookout had been kept up; and while every effort was made to stop the train, and while it was stopped within a reasonable distance, it was impossible to avoid striking the stock.

The appellee argues that from the distance intervening between the first and the last animal, and from the hoof marks, it is apparent the train men, in the exercise of due care, might have saved a part or all of the stock. After a full examination we regard the *data* as well as the conclusion reached by this argument wholly unsatisfactory, and that property should not be taken from one and given to another upon grounds so unsubstantial. When all the inferences drawn from the plaintiff's proof are not of themselves sufficient to make out a case, and when they are overcome by the direct proof offered by defendant, the result should clearly have been otherwise.

We deem it unnecessary to recite or discuss the proof more in detail, as no useful purpose would be attained thereby, and will merely announce the conclusion we have reached after thoroughly reading and considering the evidence, and the arguments thereon. The judgment will be reversed and the cause remanded.

Calef v. Parsons et al.

1. *Conveyance of an Estate in Freehold.*—A conveyance of an estate in freehold to commence *in futuro* is good in this State, though there be no particular estate to support it, as was necessary at common law.

2. *Judgments—Notice.*—All persons are presumed to take notice of the judgments of the Circuit Courts, and when dealing with property subject to the liens of such judgments they are bound thereby whether they in fact have such knowledge or not. The judgment is the recorded conclusion of the court and imports verity. Though it may be erroneous and though upon the face of the whole record, including the pleadings in the cause, it may appear that this is such error as would induce a reversal if examined by an appellate tribunal, yet while unreversed and in full force it is nevertheless valid and binding.

3. *Equity Follows the Law.*—Equity follows the law, and where no equitable considerations intervene, or where equities are equal, it will leave the parties to the situation assigned them at law.

4. *A Rule of Equity.*—It is a rule of equity that the vigilant and not the slothful shall enjoy its favor; so where a plaintiff who had obtained a judgment in 1882, which was radically defective, to his injury, had caused an execution to be issued upon it, and after a return of *nulla bona*, permitted his judgment to remain in its defective condition more than six years, and when, after he received all that in point of law he was entitled to on the face of the record, he gave notice for the first time to a purchaser of real estate affected by the judgment that he would apply to the court to have his judgment amended, *it was held* that he was guilty of gross *laches*, and in no condition to ask for equitable relief upon the ground that the purchaser, who was guilty of no actual fraud and who had no actual knowledge of the true state of things, was bound to examine the whole record, and to assume that at some time in the future the plaintiff would obtain an amendment to his judgment.

Memorandum.—Bill in chancery to set aside fraudulent conveyances. Appeal from a decree dismissing the bill rendered by the Circuit Court of Cass County; the Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

MORRISON & WHITLOCK, solicitors for appellant.

MILLS & MCCLURE, solicitors for appellees.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was a bill in chancery, filed by Calef against Parsons and Elva J. Saunders, to set aside certain conveyances of real estate made by said Parsons to said Saunders. Decree for defendants. It appears that at the February term, 1882, of the Circuit Court of Cass County, said Calef brought an action of debt against one Melbourne Parsons and said Norman Parsons upon a promissory note, and obtained a judgment "for the sum of \$325 debt, which debt may be discharged upon the payment of the sum of \$209.56, being the amount of damages so assessed," etc. In entering up this judgment the clerk committed an error, as is apparent when all the files of the case and the minutes of the judge are examined, in providing that the debt should be discharged on payment of the damages. The debt was the principal

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and the damages consisted of the interest upon the note. On October 4, 1878, nearly five years before this judgment was obtained, said Norman Parsons had given a mortgage to said Elva J. Saunders, who was his step-daughter and resided in his family, on Block No. 60, etc., in Beardstown, to secure a promissory note for \$100, due January 1, 1881. At that time the said Parsons owned and occupied as his homestead the S. $\frac{1}{2}$ of Lot 3, and all of Lot 4 in Block 46, in Beardstown. He owned no other real estate thereafter.

On the 21st of March, 1882, an execution issued on said judgment, and, following the form of the judgment, provided for discharge of the debt on payment of the damages. It was returned *nulla bona*. On the 2d of September, 1887, said Norman Parsons conveyed the homestead property (one-half Lot 3 and Lot 4, Block 46) to said Elva J. Saunders for the consideration of \$700, reserving to himself the possession of the premises during his lifetime, and requiring the grantee to pay all taxes and keep the premises in repair.

On the 21st of June, 1888, he conveyed to her also said Block 60 for the expressed consideration of \$800, and on the same day the clerk of the Circuit Court gave said Parsons a receipt for \$301.90 in payment of said damages and interest thereon, and all cost.

This money was paid by said Elva J. Saunders, through some other person or persons.

On the following day, June 22d, Calef received the money from the clerk and gave his receipt therefor.

On the 21st of July, 1888, said Elva J. Saunders and Sarah C. Parsons, wife of said Norman Parsons, mortgaged the homestead property to the Mutual Loan and Savings Association to secure a loan of \$700.

On the 9th of August, 1888, notice was served on Melbourne Parsons, Norman Parsons and Elva J. Saunders of a motion to be entered in the Circuit Court to correct said judgment, so that the debt should become a part of the same, and on the 16th of October, 1889, said motion was allowed and the judgment was accordingly amended, subject to the intervening rights of third parties.

Execution was issued on this amended judgment and return *nulla bona*, and therefore this bill was filed.

It is not necessary to set out the evidence in detail, though it is not voluminous.

While it appears that Parsons knew there must be a mistake in the judgment, it is not shown that Miss Saunders had any such information. She testifies, and it is not contradicted, that she did not know there was any judgment until about the time she was negotiating with the Mutual Loan and Savings Association for a loan upon the homestead property. An abstract was required and obtained, and thus the fact of a judgment was brought to her notice, but she seems not to have known how much was required to remove the lien thereof. This she left to Mr. Hewitt, the attorney of the association, and, as advised by him, paid the amount already stated. He then passed the title as correct and she obtained the loan. It does not appear that in this she acted in bad faith, or that she had any actual knowledge or reason to suppose that the judgment was not in proper form and for the proper amount.

Nor do we think there is any such want of consideration in either conveyance as to justify the charge of fraud. As to the homestead property, the price paid was not inadequate, in a legal sense, considering that the grantor reserved a life interest; that the deed was not signed by his wife, and that the grantee was to pay the taxes and keep up the repairs; and as to the block, the price actually paid was something over \$500, which was probably all it was worth.

The transactions are clouded by the fact that the grantee was the step-daughter of the grantor and had been a member of his family since childhood; that she had rendered him a great deal of assistance in the discharge of his duties as postmaster, and that both parties regarded as a makeweight, if not as a substantial element of consideration, a certain measure of unliquidated obligation growing out of such services. But it is clear that she had earned money in her capacity as a teacher in the public schools, and that to the extent of \$700 for the homestead and over \$500 for the block

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she made actual cash payments of her own funds—regardless of what he or she might have thought was equitably due her on account of said services. With regard to the deed for the homestead, we think it can not be urged that there was such reservation as to make the transaction fraudulent in law. There was no secret trust—no concealed agreement for the benefit of the grantor.

He merely sold her an estate, to begin at his death, for the recited payment of \$700, and the agreement on her part to pay taxes and repairs from the date of the conveyance.

A conveyance of an estate of freehold to commence *in futuro* is good in this State—though there be no particular estate to support it, as was necessary at common law. *Shackelton v. Seabee*, 86 Ill. 717; *Vinson v. Vinson*, 4 Brad. 138.

Here there was a transaction formal in law and for a consideration not inadequate.

Although it was between relatives, and although the grantor knew the judgment was not for the proper amount, yet we find there is no evidence of actual fraud on her part. Whatever may have been the design of the grantor, the grantee is unaffected in this respect. And though he did know the judgment was erroneous, it is not necessary to infer any fraudulent purpose on his part.

If his creditor was content with a judgment which gave him a lien for only a part of his claim, was there any reason why he should not be permitted to sell or otherwise dispose of his property subject only to the lien actually created by the judgment? Whose business was it to procure a proper judgment?

This brings us to consider what constructive notice the judgment gave the grantee as to the rights of the judgment creditor.

All persons are presumed to know and take notice of the judgment of the Circuit Court, and when dealing with property subject to the lien of such judgments they are bound thereby, whether they in fact have such knowledge or not. The judgment is the recorded conclusion of the court and it

imports verity. Though it may be erroneous, and though upon the face of the whole record, which includes the pleadings in the cause, it may appear that there is such error as would induce a reversal if examined by an appellate tribunal, yet while unreversed and in full force it is nevertheless valid and binding.

It is not to be expected, however, that a person about to purchase property subject to the lien of a judgment should be required to inspect the pleadings and files to ascertain, at his peril, whether the judgment should not have been for a different and larger amount.

The court had judicially determined that matter, and whether right or wrong, such determination was conclusive as long as it was permitted to remain without amendment.

No other rule would enable one to deal safely with property subject to judgment lien. Such is certainly the legal view of the matter, and how will equity regard it? Equity follows the law, and where no equitable considerations intervene, or where equities are equal, it will leave parties to the situation assigned them at law. Here was a plaintiff who had obtained a judgment in 1882, which was radically defective, to his injury. He caused an execution to be issued upon it and after a return of *nulla bona*, the judgment was permitted to remain in its defective condition until 1888, a period of more than six years, when, after he had received all that in point of law he was entitled to on the face of the record, he gave notice for the first time to a purchaser of real estate affected by the judgment, that he would apply to the Circuit Court for an amendment.

It is a rule of equity that the vigilant and not the slothful shall enjoy its favor.

This complainant was guilty of gross *laches*, and was in no condition to ask equitable relief upon the ground that the purchaser of the property, who was guilty of no actual fraud and who had no actual knowledge of the true state of things, was bound to examine the whole record and to assume that at some time in the future the complainant would obtain an amendment of the judgment.

Keyes v. Binkert.

After the judgment had been suffered to remain in its original condition for six years, why should any one who had ever examined the pleading and files be required to so assume at his peril? We are unable to perceive the equitable force of such a proposition. The parties were dealing with legal rights as to property subject to a lien at law; the proceeding was—as to the grantee at least—free from fraudulent knowledge or purpose, and for a reasonably fair and adequate consideration in both instances.

We are clearly of opinion the complainant had no standing in a court of equity and that the decree dismissing the bill should be affirmed.

Keyes v. Binkert et al.

1. *Pleading in Assumpsit*.—When the action of assumpsit is on an undertaking which the law presumes to have been made because of certain acts, or the conduct of a party, though he has actually made no promise, the accepted form of pleading requires an averment of liability because of the acts, and of a promise which the law implies from the existence of the liability; but when the action is brought upon an express contract to do a certain act, no allegation of an implied promise is necessary.

Memorandum.—Appeal from the order of the Circuit Court of Adams County, sustaining a demurrer to the plaintiff's declaration; the Hon. OSCAR P. BONNEY, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

STATEMENT OF THE CASE BY THE COURT.

The only question arising in this case is as to the sufficiency of the following declaration, viz:

STATE OF ILLINOIS,	}	ss.	In the Circuit Court of Adams
County of Adams,			
			County. To the March term, A.
			D. 1892. No. 3782.

Edward Keyes, plaintiff, by L. H. Berger, his attorney, complains of John S. Cruttenden and Anton Binkert,

partners, trading and doing business under the firm name and style of Binkert & Cruttenden, at Quincy, in said State and county, defendants, of a plea of trespass on the case on promises. For that whereas on the 16th day of October, 1891, in the said city of Quincy, became and were indebted to the said plaintiff in the sum of one thousand dollars of lawful money of the United States of America, for and on account of the premises herein-after mentioned, to wit: that is to say, the plaintiff, at the request of the defendants, bargained for and agreed to buy of the defendants the following described real estate, situate, lying and being in the city of Quincy aforesaid, to wit: the north one hundred and eight feet of the east half of block eighteen of Alstyne's addition to the city of Quincy, upon the terms and conditions of a written contract entered upon and signed and agreed to by and between the parties plaintiff and defendant to this suit, which said paper, writing or contract was and is in the following words and figures, to-wit:

“CONTRACT FOR SALE OF REAL ESTATE.

Office of BINKERT & CRUTTENDEN, 214 North Sixth Street. }
QUINCY, ILL., October 16, 1891. }

Received of Edward Keyes twenty-five dollars (\$25) as part payment toward the purchase of the following described real estate: The north one hundred and eight (108) feet of the east half of block eighteen (18) of Alstyne's addition to the city of Quincy, situated in the county of Adams and State of Illinois, which is hereby bargained and sold to the said Edward Keyes for the sum of eight hundred and sixty-four dollars (\$864); eight hundred and thirty-nine dollars (\$839) more to be paid on the delivery of a good and sufficient warranty deed of conveyance for the same within ten days from this date, or as much sooner as the deed is ready for delivery after he has had the title examined and found good. Should the title to the property not prove good, then this \$25 to be refunded. But should the said Edward Keyes fail to perform this contract on his part promptly at the time and in the manner above specified (time being the essence of this contract), then the above

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twenty-five dollars (\$25) shall be forfeited by him as liquidated damages, and above contract shall be and become null and void.

BINKERT & CRUTTENDEN. (Seal.)
EDWARD KEYES. (Seal.)"

And in consideration of said agreement and undertaking the defendants agreed and promised to deliver unto the plaintiff a good and sufficient warranty deed of conveyance for the premises herein before described, if within ten days from the said 16th day of October, 1891, the plaintiff would pay the defendants \$839. The said defendants on said 16th day of October, 1891, then having received the sum of \$25 as part of the purchase money under the agreement hereinbefore set forth, and the said plaintiff did, on the 21st day of October, 1891, find the title to the said premises to be good, and on the same date, at the office of said defendants, tender unto said defendants the further sum of \$839 of lawful money of the United States, said sum being the balance due under said agreement, and then and there demanded of said defendants a good and sufficient deed of warranty for said real estate described in said agreement; and although the plaintiff has complied with all of his agreements and undertakings by him to be performed under said agreement, and within the time specified therein, the defendants have refused to deliver a good and sufficient warranty deed of conveyance unto plaintiff for the real estate described in said agreement, and the said plaintiff avers that the time for conveying said real estate unto him has long since elapsed.

Yet he is willing to accept and has always been ready to accept a good and sufficient warranty deed of conveyance for said real estate and to pay for the same at the price aforesaid, to wit, \$839, at the office of the said Binkert & Cruttenden aforesaid. Yet the defendants did not, nor would, within the time specified in said agreement, after the making of said promise, or at any time afterward, deliver unto plaintiff a good and sufficient warranty deed of conveyance for the premises described in said agreement, after the making of said promise, or at any time afterward, deliver unto plaintiff a good and sufficient war-

ranty deed of conveyance for the premises described in said agreement but refused so to do, whereby the plaintiff has been deprived of divers great gains and profits, which otherwise would have accrued to him from the delivery of said deed to him as aforesaid, to the damage of the plaintiff in the sum of one thousand dollars, and therefore he brings his suit, etc.

L. H. BERGER, attorney for plaintiff.

The demurrer filed to said declaration is as follows :

“ And the said defendants come and say *actio non*, because they say the plaintiff secondly thirdly amended declaration, and the matters and things therein contained are insufficient in law to maintain the action aforesaid, and they are not bound by law to answer the same, wherefore they pray judgment, etc.

And for special causes of demurrer said defendants show :

1. This is an action of assumpsit and there is no allegation in said thirdly amended declaration, contains no averment of any promise by the defendant to pay anything to plaintiff.

2. The declaration contains an averment of a tender and offer to pay money and a demand for a deed, at a time before the defendants were, by the terms of the contract set out in the declaration, bound to deliver a deed, but contains no averment that the tender was made at the expiration of the time within which, by the terms of the agreement, the defendants were to deliver such deed.

3. Said secondly amended declaration is, in other respects, informal and defective.

JOHN H. WILLIAMS.”

The Circuit Court sustained a demurrer to this declaration. The appellant refused to amend, and, the action being dismissed, prosecutes this appeal.

APPELLANT'S BRIEF.

The declaration meets with every legal requirement and “ is certain to a common intent in general.” The People v. Shaw, 14 Ill. 476.

Keyes v. Binkert.

A declaration is always sufficiently definite when it states the contract in terms as in substance. *White v. Thomas*, 39 Ill. 227.

Where two acts are to be done at the same time, as for instance, A agrees to deliver to B a good and sufficient deed for land on a certain day, the agreement is a dependent one. *Hunt v. Livermore*, 5 Pick. (Mass.) 395; *Howland v. Leach*, 11 Pick. (Mass.) 151; *Parker v. Parmele*, 20 Johns. (N. Y.) 130; *Gazely v. Price*, 16 Johns. (N. Y.) 266.

Where the acts concerning which the undertakings are made have some necessary relation to each other, the undertaking may be dependent. *Knight v. N. E. Worsted Co.*, 2 Cush. (Mass.) 286; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 439.

The law only requires a willingness or readiness to make a tender. *White v. Thomas*, 39 Ill. 227; *Hough v. Rawson*, 17 Ill. 588; *Funk v. Hough*, 29 Ill. 145.

When concurrent acts are to be done at the same time, no action can be maintained without showing performance, or a readiness and offer to perform, and either party stating that the defendant neglected to attend when necessary or refused to perform his part. 208 Saunders' Pleading.

L. H. BERGER, attorney for appellant.

APPELLEES' BRIEF.

"No distinction exists in pleading between an implied promise and an express one; it is true that in evidence the law in many cases implies, from certain facts, that a promise has been made; but in pleading the supposed promise itself should be alleged." Chitty, Vol. I, page 302.

"In assumpsit the declaration must express a consideration and a promise in such a manner as to be sufficient." *Read v. Walker*, 52 Ill. 334.

JOHN H. WILLIAMS, attorney for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge*.
The wording of the contract is somewhat peculiar and

its meaning for that reason is not so readily determined; but when all of its provisions are considered together and in proper connection we think the duties, rights and obligations of the respective parties satisfactorily appear.

As we construe it, the appellees contracted to sell to the appellant the premises described, and obligated themselves to convey the same to him by warranty deed within ten days, upon the payment of balance of the purchase money. The appellant, by the contract, became obligated to receive the deed and pay the money therefor at any time within said period of ten days, when the appellees might choose to offer it to him, if the title of the appellees, upon examination, proved to be good. Thus it is seen the appellant was required to be ready at all times during the ten days after he had examined the title to accept the deed and make payment therefor.

By tendering the balance of the purchase money he waived all question as to the sufficiency of the title, and in effect announced to the appellees that he was ready, willing and able to complete the transfer of the property. He could not know whether they were ready upon their part. If they were not, it became incumbent upon them to take such steps as might be necessary to enable them to perform their undertaking within the time limited, and when so ready to advise the appellant, to deliver him the deed and receive the money which they knew he was holding for them.

After having once tendered the money, a readiness and ability to comply, accept the deed and pay the money at all times within the ten days, is all that ought to be required of the appellant.

As to the rule in such cases, see 2 Parsons' Contracts, page 677; Hough v. Rawson, 17 Ill. 588; 3 Amer. and Eng. Ency. of Law, page 910, and note 1.

The declaration, though inartistically drawn, substantially states that the appellant made the tender, and during all the time in question thereafter was ready and willing and prepared to pay the money and take the deed, and that the appellees failed and refused to comply with their agreement

Maddox v. Epler.

to deliver the deed, not only when he tendered them the money but also during all the time of the ten days mentioned in the contract and until the beginning of the suit.

We do not think an allegation of a promise by appellees to pay damages which the law would impose upon a breach of the contract is at all necessary to a good declaration.

When the action of assumpsit is on an undertaking which the law presumes to have been made because of certain acts, or the conduct of a party, though he has actually made no promise, the accepted form of pleading requires an averment of liability because of the acts, and of a promise which the law implies from the existence of the liability. When the action is brought on an express contract to do a certain act, no allegation of an implied promise is necessary. Wait's Actions and Defenses, Vol. 1, pages 370 to 376.

The demurrer should not, in our opinion, have been sustained, but should have been overruled.

The judgment must be reversed and the cause remanded, with instructions to overrule the demurrer and require the appellee to plead to the declaration.

Maddox et al. v. Epler.

1. *Husband and Wife—Wife's Separate Property.*—Where a wife permitted her husband to use her money in his business operations and to buy and take deeds in his own name, and to retain the same for a period of six or seven years, during which period he became in debt and then conveyed the land to his wife, she can not be heard, in a proceeding by a creditor's bill, to say that she had an understanding with her husband that he would protect her by putting the land in her name when it was paid for, to defeat a creditor who may have trusted her husband on the faith of the property he held with her knowledge and consent.

2. *Homestead Right.*—In a proceeding by creditor's bill, where a decree is entered for the sale of real estate and an appeal taken, the question of homestead rights can not be raised for the first time in the Appellate Court.

Memorandum.—Creditor's bill. Appeal by the defendants from a decree of the Circuit Court of Morgan County; the Hon. LYMAN LACEY,

Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

STATEMENT OF THE FACTS BY THE COURT.

This was a creditor's bill by appellee against appellants, filed October 29, 1890, alleging that on June 19, 1890, complainant, William Epler, obtained judgment in the Circuit Court of Morgan County against Samuel Maddox, for \$390.98; that execution issued thereon August 25, 1890, and returned unsatisfied, "no property found," September 8, 1890; that said judgment remained in full force, etc.; that said judgment was for pasturage debt, incurred January 5, 1888, on which last date said Samuel Maddox was the owner of a valuable farm of 147 acres in said Morgan county, which, on January 27, 1888, he fraudulently, and without any valuable consideration, conveyed to his wife, Mildred Maddox.

That afterward, on August 9, 1890, said Mildred and Samuel Maddox conveyed said farm to John T. Wright, consideration \$8,700, retaining vendor's lien to secure \$2,000 of purchase money, balance paid in cash. That said Mildred Maddox had no money or property other than the said land and the proceeds thereof, and has invested said proceeds in lot 4 in Grierson's first addition to Jacksonville, and all that part of "outlot" 20 in Grierson's second addition to Jacksonville lying north of said lot 4 and south of the right of way of the Wabash Railway Company, situate in Morgan County, Ill. That at the time of said conveyance by Samuel Maddox, he did not have or retain any property sufficient to pay complainant and other creditors. That complainant is entitled to have his judgment satisfied out of said last described premises. That Elisha Lawson has some interest in said premises. Makes Mildred and Samuel Maddox and said Lawson defendants. Prays for summons, and that said last described premises may be subjected to payment of complainant's judgment, and for other and further relief, etc. Answer of Mildred and Samuel Maddox filed December 27, 1890. Admits judgment, issu-

Maddox v. Epler.

ance of execution, its return "no property found," and that said judgment remains in full force, etc. That said judgment was for pasturage, for which complainant Epler had an agister's lien by statute, which he neglected to enforce. That said pasture debt accrued after, and not before, said conveyance of January 27, 1888, of Maddox to his wife. Denies that said conveyance was fraudulent, or without consideration, and alleges that the consideration was moneys due from Samuel to Mildred Maddox, derived by Mildred from her father's estate, subsequent to the year 1861. Denies that Samuel Maddox, at the time he conveyed, did not retain sufficient other property to pay complainant and other creditors. Admits that part of the purchase money of the conveyance to John T. Wright was invested in the Jacksonville property, as charged in complainant's bill, and claims it as her separate property, and denies the right of complainant Epler to have his judgment satisfied out of it.

Decree, November term, 1891. Finds issue for, and equities with complainant. Recites judgment, issuance of execution, return of same *nulla bona*, and that said judgment remained in full force, unsatisfied, etc., and that said judgment was for pasturage debt, incurred January 5, 1888, at which date Samuel Maddox owned the 147 acre farm, and that on January 27, 1888, he conveyed same to his wife, Mildred Maddox, and did not at the time retain sufficient other property to pay complainant and other creditors, and is not insolvent; that said conveyance to Mildred was fraudulent as to complainant; that subsequently, on August 9, 1890, said Mildred conveyed said farm to John T. Wright in consideration of \$8,700, and with the proceeds purchased the Jacksonville property in Grierson's additions, as described. Orders Samuel and Mildred Maddox, within twenty days, to pay complainant, William Epler, the judgment for \$390.98, with interest and costs, and that in default, the master sell the said Jacksonville premises to satisfy same.

Exceptions by Mildred and Samuel Maddox, upon whose appeal the record is brought to this court.

APPELLANTS' BRIEF.

If Maddox retained sufficient other property out of which appellee and other creditors could have realized, the conveyance by Maddox to his wife, January 27, 1888, was not fraudulent, and the consideration of some \$8,000 previously furnished Maddox by his wife was sufficient, and the decree of the court below should have been for the defendants. *Koster et al. v. Miller*, 4 Brad. 21; *Shackleford v. Todhunter*, 4 Brad. 271; *Bittinger v. Kasten et al.*, 111 Ill. 260.

Elisha Lawson, as alleged by appellee's bill, had an interest in the property sought to be subjected. He was made a defendant and regularly served with summons. The decree should have disposed of his interest, and it failing to do so, it is error. *County Commissioners v. Reeve*, 5 Brad. 606.

Even if the original conveyance was fraudulent, it does not affect the homestead interest; invested, or uninvested, to the extent of \$1,000, it is exempt from such sale. Appellee's judgment was never a lien upon it, or upon the land conveyed to her by her husband. *Leupold et al. v. Krause*, 95 Ill. 440; *Jaffer v. Anneals*, 91 Ill. 487; *Bell v. Devore et al.*, 96 Ill. 217; *Hubbell et al. v. Canady*, 58 Ill. 425; *Redden et al. v. Potter*, 16 Brad. 265; *Sanford et al. v. Finkle*, 112 Ill. 146.

WM. A. CRAWLEY, solicitor for appellants.

APPELLEE'S BRIEF.

"The doctrine as to voluntary conveyances as against pre-existing creditors laid down by the Supreme Court of this State is that all such conveyances are void." The only exceptions to this rule recognized in this decision is when the grantor is in prosperous condition and unembarrassed at the time, and that it depends on his ability to withdraw that amount from his estate without the least hazard to his creditors, or in any material degree lessening their prospect

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of payment. Russell v. Fanning, 2 Brad. 632; Lyttle v. Scott, 2 Brad. 646; Mitchel v. Byrns, 67 Ill. 522.

R. W. MILLS, attorney for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

After a careful consideration of the evidence we are of opinion the proof supports the decree.

The wife had advanced various sums to the husband from time to time, beginning more than twenty years before the deed which was made to her in 1888. She permitted him to use the money in his business operations and to buy land. The farm in question was purchased six or seven years before it was deeded to her, and while she says she had some sort of an understanding with him that he would protect her by putting the land in her name when it was paid for, yet we think this was too indefinite, and that after she had permitted him to use the money as his own and to put land in his own name, she can not be heard to set up such a claim as she makes here to defeat a creditor who no doubt trusted him on the faith of the property he so held with her knowledge and consent.

It is apparent she would not have asked for the deed, but for suggestion made by her father, and the apprehension that her husband was in failing circumstances. She did not seem to know much as to his financial condition and suffered him to use her funds without conditions and probably without any fear of mismanagement or failure.

It would be inequitable under such circumstances to permit the deed to stand as against *bona fide* creditors who were unaware of the alleged claim in her favor. Whatever might be the equitable aspect of the matter as between her and her husband she can not complain if such creditors are allowed to assert a lien upon the property as against her. But it is extremely doubtful whether she could be regarded as her husband's creditor. She took no note from him, indeed she kept no memorandum of the sums she gave him, and it is by no means certain that she had any intention or

that there was ever any definite understanding that he was to account to her, or to secure her for such advances. *Hocket v. Bailey*, 86 Ill. 74; *Frank v. King*, 121 Ill. 250; *Lowentrout v. Campbell*, 130 Ill. 503.

Nor do we think that he retained enough unincumbered property to protect the complainant. On this point the evidence is somewhat confused and conflicting, but we are satisfied with the finding of the decree in that regard.

The point is now made, and evidently for the first time, that the property ordered to be so sold was the homestead of the parties, and therefore that the decree was erroneous in not making provision to protect the rights in respect thereto.

No suggestion of the sort was made in the pleadings, nor does the evidence clearly disclose that such was the fact. Some parts of the testimony seem incidentally to point in that direction, though not with much certainty.

The property is no doubt worth much more than the amount of the complainant's claim and the value of the statutory homestead, and it is apparent there was no intention of presenting any question as to the homestead upon the hearing of the case, the only contested point being whether the complainant had a right to impeach the conveyances by which the title was placed in the name of the wife. We therefore hold that the question can not now be raised for the first time in this court. Had it been properly presented to the Circuit Court the rights of the parties as to the homestead would have been considered, and the conclusion then reached, if not satisfactory, might have been assigned as error. As the record now appears we can not consider the objection. The decree will be affirmed.

Oakford et al. v. Robinson.

1. *Foreclosure in Chancery—Parties.*—A person holding an unrecorded deed of mortgaged premises and not being in possession, can not complain because he is not made a party defendant in foreclosure proceedings.

48 270
58 313

48 270
72 647

48 270
79 646
174 149

48 270
181 561

Oakford v. Robinson.

2. *Appointment of a Receiver.*—The fact that the rents and profits of mortgaged premises, as well as the land itself, is pledged for the payment of the mortgage debt, will authorize the appointment of a receiver in the discretion of the court, without regard to the solvency of the mortgagee.

3. *Deficiency—Lien for Rents and Profits During the Statutory Period Allowed for Redemption.*—When the rents and profits of the land, as well as the land itself, is pledged by a mortgage for the amount due the mortgagee by the appointment of a receiver, he has an equitable lien upon such rents and profits during the statutory period allowed for redemption for the full payment of any deficiency that may arise upon a sale of the premises to pay the debt.

Memorandum.—Mortgage foreclosure in chancery. Appeal from an order discharging a receiver and apportioning rents and profits rendered by the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and reversed. Opinion filed October 17, 1892.

STATEMENT OF THE CASE BY THE COURT.

On the 4th day of June, 1891, the appellants were awarded a decree of foreclosure upon a mortgage executed to them by Joshua H. Green and wife.

The mortgage contained a clause authorizing the appointment of a receiver, with power to take possession of the premises and collect the rents due or to become due thereon during the period allowed for redemption and apply the same in payment of any deficit should the premises prove insufficient to pay the amount secured by the mortgage.

The decree passed without an order appointing a receiver, but on the 24th day of June, 1891, upon a petition framed for that purpose, and upon due notice to the defendants to the decree, a further decree was duly entered, finding that the premises mortgaged were of value insufficient to pay the decree debt and cost, and ordering that one George W. Clark be appointed a receiver, with power and authority to collect and receive the rents, issues and profits of the lands then due, or to become due, and report the same to the court.

The master in chancery sold the land under the decree on the 2d day of July, 1891, but for an amount insufficient

to pay the decree debt and costs, the deficiency being \$199.90. The receiver proceeded at once to the discharge of his duties by collecting rents that were due and by leasing the land to tenants for future use.

On the 5th day of December, 1891, the appellee, Robinson, presented a petition to the court in the foreclosure proceeding, in which he represented to the court that he became the owner of the mortgage lands in October, 1890, by a deed from the mortgagors; that he did not record the deed until November 6, 1891, on which last-named day he redeemed the land from the sale by the master by paying to that officer the amount of such sale and eight per cent interest thereon from the date thereof, and praying that the receiver be discharged and possession of the lands delivered up to him.

The receiver, under an order of the court, reported rents collected to the net amount of \$89.01, which, upon a hearing upon the petition aforesaid, was ordered to be paid, one-half to the appellants and the other half to the appellee. The court also discharged the receiver from further duty or power in the premises.

From this order discharging the receiver and apportioning the rents between the parties, the appellants (the mortgagees) appeal.

APPELLANTS' BRIEF.

When, upon the maturing of the indebtedness, the security being inadequate, the mortgagee files his bill for a foreclosure, and procures the appointment of a receiver, he thereby obtains an equitable lien upon the unpaid rents, and will be entitled thereto to the extent of any deficiency in the security. High on Receivers, Sec. 644; Howell v. Ripley, 10 Paige, 43; Lofsky v. Monger, 3 Sandf. Ch. 69; Post v. Dorr, 4 Edw. Ch. 412.

“By the appointment of a receiver, the mortgagee obtains an equitable claim, not only upon the rents and profits actually due at the time, but also upon the rents to accrue; and his right to them is superior to that of the mortgagor's

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assignee in bankruptcy, or to that of any one claiming under the mortgagor, as, for instance, his grantee, who has bought subject to the mortgage." 2 Jones on Mortgages, Sec. 1536; High on Receivers, Sec. 643.

DOOCY & BUSH, HARRY HIGBEE and E. L. McDONALD,
attorneys for appellants.

APPELLEE'S BRIEF.

The order made by appellants appointing a receiver did not require the receiver to pay the money arising from rents, etc., to appellants, but directed him to report his doings to the court. *Seligman v. Laubheimer*, 58 Ill. 124; *Lloyd v. Karnes*, 45 Ill. 62.

MORRISON & WHITLOCK, solicitors for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The appellee, Robinson, held subject to the mortgage, and as his deed was not of record and he had not possession of the land, he can not complain that he was not made a party defendant to the foreclosure proceeding.

The rents and profits of the land, as well as the land, was pledged by the mortgage for the security and payment of the amount due the appellee. This authorized the appointment of a receiver, in the discretion of the court, without regard to the solvency of the mortgagor. 8 Amer. & Eng. Ency., page 234; 2 Jones on Mortgages, Sec. 1516. And such appointment was lawfully made, though by a decree subsequent to the original decree. 8 Amer. & Eng. Ency. of Law, page 239.

By the appointment of the receiver the appellants obtained an equitable lien on the rents and profits of the land during the statutory period allowed for redemption, if necessary, for the full payment of any deficiency in the security. In support of this view, see 1 Jones on Mortgages, Secs. 773, 774 and 775; 2 Jones on Mortgages, Sec. 1536;

High on Receivers, Secs. 643 and 644; Beach on Receivers, Sec. 532.

Appellee's title to the property was subject to the mortgage held by the appellants, and his right to the rents and profits of the land was, under the mortgage and the decree of the court, secondary to that of the appellants.

The payment by the appellee to the master in chancery of the amount requisite under the statute to effect a redemption from the sale did not operate to destroy this lien of the appellants, but such lien remained unaffected by the redemption, and could only be discharged by payment of the deficiency or by the application by the receiver of the rents and profits toward the payment of such unpaid balance. Therefore, the receiver should not have been discharged, nor should any portion of the money received from the rents of the lands have been ordered paid to the appellee.

The decree in each of these respects is reversed and the cause is remanded, with directions to the court to order the rents in receiver's hands paid to the appellants, and to cause all other sums received by the receiver during the period allowed for redemption paid to the appellants so far as necessary to satisfy and pay the deficiency aforesaid, with legal interest thereon from the date of the sale, the remainder, if any, to be paid to the appellee, Robinson.

The costs in this court will be taxed by the clerk to the appellee, Robinson. Reversed and remanded, with directions.

Chicago, Peoria & St. L. Ry. Co. v. Lewis.

1. *Railroad Accidents—Burden of Proof.*—When a railway car is thrown from the track, whereby a passenger is injured, the presumption arises that the accident resulted from an imperfect condition of the track or from bad management of the trains, or both combined, and the burden of proof is upon the company to show that it was free from negligence.

2. *Speed of Trains.*—While the statute and the rulings of the courts

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may not have fixed a rate beyond which a train can be safely moved, yet it is manifest there must be a limit, and that when such limit is exceeded the law will impute negligence. What the limit is will depend on circumstances very largely, such as the condition of the road bed, the weight and strength of the rail and the character and condition of the rolling stock.

3. *Duty of Common Carriers.*—Common carriers of persons are required to use all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers.

4. *Damages.*—Necessarily the estimate of damages for personal injuries and suffering must depend upon the judgment of the jury; there can be no direct proof in regard to it, and witnesses can not be allowed to express an opinion upon it.

5. *Change of Venue—Waiver.*—When the venue in a civil proceeding is changed and the cause is sent for trial to a county outside of the judicial circuit in which it arose, and no exception is taken to the order granting the change in the county where it is entered, nor a motion made in the county to which it is sent, and the party goes to trial without objection, whatever error there may have been in the order of the court changing the venue is waived.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

The accident which resulted in the injury for which the plaintiff below seeks to recover, happened on Sunday morning, March 8, 1891. The plaintiff, with others, took a passenger train known as the Red Express, running from Chicago to St. Louis, at Peoria, and was going to Havana. At the time of the accident he was not sitting in the regular seats, but in a seat running parallel with the car, which he calls the "conductor's seat." The train was a complete wreck, the cars took fire and burned, three persons were killed, a corpse was burned. The engine was wrecked and everything crushed into a hopeless mass of ruins. Without any fault on his part, plaintiff was caught amidst the *debris*; his collar bone and jaw bone were broken; he was injured internally. The negligence charged is careless and improper management of the engine and train, running at a reckless

and dangerous rate of speed, and that the rails were insecurely spiked and broken, the ties decayed, etc.

APPELLANT'S BRIEF.

"There is no general law in this State imposing any restraint as to the rate of speed a company may run its train." It may adopt any rate without subjecting itself to liability if it is not otherwise at fault. *W., St. L. & P. Ry. Co. v. Neikirk*, 15 Bradw. 172; *W., St. L. P. Ry. Co. v. Wiesbeck*, 14 Bradw. 525; *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510; *St. L. & S. E. Ry. Co. v. Brits*, 72 Ill. 256, 260, 261; *P. & U. P. Ry. Co. v. O'Brien*, 18 Bradw. 28; *C. & N.W. Ry. Co. v. Dimick*, 96 Ill. 42; *City of Peoria v. Simpson*, 110 Ill. 294; *Rolling Mills v. Morrissey*, 111 Ill. 646; *C., B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88.

I. L. MORRISON, general solicitor.

WALLACE & LACEY, attorneys for appellant.

WRIGHT & WRIGHT, and H. W. MASTERS & SON, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

The appellee recovered a judgment against the appellant for \$3,000, on account of injuries sustained by reason of the wrecking of a train upon appellant's road while appellee was a passenger. The entire train was thrown from the track, several persons were killed and the greater part of the train with the property thereon was consumed by fire which caught from the stove. There is but little doubt that the wreck was caused by the breaking of a rail or of several rails, and this was probably caused by the defective condition of the ties.

The condition of the road was not such as to justify the speed ordinarily attained by passenger trains. The declaration in one count alleged a dangerous rate of speed, and in another that the rails and ties were defective.

When a railway car is thrown from the track whereby a passenger is injured, the presumption arises that the accident resulted from an imperfect condition of the track or from bad management of the train, or both combined, and the *onus* is upon the company to show that it was free from negligence. *T. W. & W. Ry. Co. v. Beggs*, 85 Ill. 80; *P. P. & J. R. R. Co. v. Reynolds*, 88 Ill. 418.

After carefully considering the evidence, we are satisfied that the company did not show that it was free of negligence in this case, but that the weight of evidence offered on the issue as to the condition of the track is clearly with the plaintiff. There was no want of care on the part of the plaintiff, and it follows necessarily that he was entitled to a verdict.

It is, however, insisted by appellant that the court erred in its instructions to the jury and in admission of evidence.

In support of the latter objection, attention is called to the fact that the plaintiff testified to the condition of the track a few days after he was hurt, and that the witness Wright was permitted to state what he saw at the same place on one occasion at a time not very definitely fixed, but somewhere between one and three weeks after the accident. This testimony related mainly to the rotten condition of the ties, which had been taken out and were lying near the track. Wright had examined the place where the wreck occurred the next morning and described what he then saw in the way of broken rails and the disturbed condition of the track where the train went off.

We think the evidence was competent as tending to show the condition of the ties a short time before, where the accident occurred, and was sufficient to throw the burden upon the company of showing when these ties were taken out of the track. No effort was made to show that these rotten ties had been taken out before the accident, and the testimony offered by the company tended to prove that they were taken out after it. It is also objected that the witness Walker was allowed to testify to the condition of the road a year after the accident.

He testified that he was in the train and helped to get the plaintiff and other injured passengers out of the wreck; that while he made no general observation of the condition of the ties, etc., he saw many pieces of broken rail, and that there were some rotten ties. He would estimate the number of the latter at one-fifth. On cross-examination, it was drawn out that this estimate as to the number of rotten ties was partly based upon his special observation made the day before he testified.

If counsel were of opinion that the estimate testified to in chief should have been excluded because it was based wholly or in part upon the observation made the day before, the question should have been presented by a motion to that effect; but this was not done, nor do we find that objection was taken to the testimony, and, of course, it can not be objected to for the first time in this court.

It is also urged that the court erred in not permitting the defendant to prove by Sloan, its road master, "that in rail-roading there is a standard as to the number of ties it takes to a thirty-foot rail to make a first-class road bed, and what that number is."

This was not a very important inquiry, as we regard the evidence which tended to show that the ties were in bad order. It was immaterial how many there were, if they were rotten.

But assuming that the question was a proper one, and that the court erred in excluding it, yet we find that in answer to subsequent questions, a little different in form and to which no objection was made, the witness was permitted to state substantially what was called for by this question. So that the defendant in fact got the benefit of this testimony on that point, whether it was relevant or not, and of course can make no complaint in this respect.

It is urged that the court erred in giving the first, second, sixth and eighth instructions for plaintiff. The objection to the first is that it "ignores care and diligence on the part of plaintiff." This is a misapprehension.

The instruction proceeds, in the first clause, to set out the

allegations of the declaration, including the averment that "the plaintiff was in the exercise of due care and caution," and then advises the jury that if they find the declaration, or either count, has been proven by the preponderance of the evidence, they should find for plaintiff. Proof of either count would include not only the specified negligence of the defendant, but also the care and diligence of the plaintiff. The case of C. & N. W. Ry. Co. v. Dimick, 96 Ill. 46, is not in point, for there no reference was made in the instruction, directly or indirectly, to the averment of care on the part of plaintiff.

The sixth instruction is objected to because it assumed, as counsel construe it, that a rate of speed might be so great as to become negligence *per se*, when, as it is argued, there is no law regulating speed.

We understand that speed may be so great as to show negligence or even criminal recklessness.

While the statute and the rulings of the courts may not have fixed a rate beyond which a train can be safely moved, yet it is manifest there must be a limit, and that where such limit is exceeded the law will impute negligence. What the limit is would depend on circumstances very largely, such as the condition of the road bed, the weight and strength of the rail and the character and condition of the rolling stock.

Other conditions might also be involved, but no matter how perfect the road and the equipment, there must be a limit beyond which is manifest danger. We think this objection to the instruction not well taken. Another objection urged is that the instruction contains no reference to the care and caution of the plaintiff.

The instruction does omit all reference to this averment in the declaration.

But we think the case is within the rule laid down in Willard v. Swansen, 126 Ill. 381 (which has been followed in later cases), that such omission is obviated by the fact that other instructions given for plaintiff as well as defendant, contained the necessary qualification. And aside from

this, there was, as we have stated in the outset, no real question on this point. It did not appear that the plaintiff was in any degree negligent. He had a seat in a passenger car provided by the company, was conducting himself properly, and nothing that he did can be said to have contributed to the result. It may be that if he had been in a different part of the train he would have shared the fate of the passengers who were killed. This is all mere speculation, useless and profitless. We repeat, there is no ground for charging negligence on his part, and if every instruction given had omitted all reference to the averment on this point we would not, under such circumstances, reverse for that reason.

It would be absurd to hold that a judgment is vitiated because of such an omission in the instruction when we are clear that the evidence shows the plaintiff was exercising ordinary care at the time he was injured and that there is nothing in the proof upon which the jury could have found otherwise.

The objection to the second instruction is that it requires "much too strict a rule of diligence." It reads as follows:

"The court instructs the jury that common carriers of persons are required to use all that human care, vigilance and foresight can reasonably do in view of the character and mode of conveyance adopted to prevent accidents to passengers."

We think it is not objectionable. It is supported by the authorities, and is a correct statement of the rule as applicable to such a cause of action, and moreover, it was substantially recognized as the correct rule in the third instruction given at the instance of the defendant.

The eighth instruction is objected to. It reads as follows:

"If from the evidence in the case and under the instructions of the court the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then to enable the jury to estimate the amount of such damages it is not necessary that any witness should have expressed an opinion as to the amount of such

damages, but the jury may themselves make such estimate from the facts and circumstances in proof.”

Counsel for appellant say that it left the jury “to wander in a field of too much conjecture and indefiniteness.” We regard it as a fair and proper statement of the rule of law applicable to the subject under consideration. Necessarily the estimate of damages for personal injury and physical suffering must depend upon the judgment of the jury. There can be no direct proof in regard to it, and no witness can be allowed to express his opinion upon the point. We think the objection is not well taken. The appellant urges that the court erred in modifying instructions No. 2, 4 and 6, asked in its behalf. We think the modifications detracted nothing from the real meaning or force of the instructions and therefore there is no ground of complaint in this respect. The objection that the court refused certain instructions asked by appellant must also be overruled, as in our opinion the substance of the refused instruction so far as correct and applicable was contained in others that were given at the request of appellant, and upon reading all the instructions given on both sides we are satisfied the jury were sufficiently advised as to the law of the case.

The appellant urges with considerable earnestness that the damages are excessive. The plaintiff claims that he suffered a fracture of the jaw and also of the collar bone, that he endured great pain for several weeks and that he was at the time of the trial affected seriously so that his health was not yet restored, that he was unable to work and was depressed mentally and nervously. In this statement he was corroborated by medical testimony. It is true there was medical testimony tending to prove that he had sustained no fracture of either the jaw or the clavicle and that he was not seriously injured.

The jury evidently believed the plaintiff's testimony and if so it is difficult to say that the damages were assessed too high. We are not inclined to interfere on this branch of the case. It is urged finally that the court erred in overruling the motion in arrest of judgment. The point thus made relates to the jurisdiction of the court.

The suit was commenced in Mason County. The appellant applied for a change of venue on account of the alleged prejudice of the inhabitants of that county and the court upon consideration of the matter allowed the application and changed the venue to Fulton County. It is said now that as Fulton County was not in the same circuit with Mason County there was error in this action of the court. It appears that no exception was taken in Mason County, to the order granting the change, nor was there any motion made in Fulton County to remand the cause nor any suggestion of irregularity. The appellant went to trial without objection and thereby waived whatever of error there may have been in the order of the Mason Circuit Court. *Johnson v. Von Kettler*, 66 Ill. 63; *Flagg v. Roberts*, 67 Ill. 485.

It is therefore unnecessary to decide the point now presented, that the cause should have been sent to some other county in the same circuit.

We find no error in the record of such gravity as to require a reversal of the judgment. Affirmed.

Lewis et al. v. Montgomery et al.

1. *Corporations—Liability of Officers—Statutes, Construction of, etc.*—In a suit brought upon a statute providing that “If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation,” it appeared that the stock of the corporation was mainly held by one man and that its affairs were practically under his exclusive management. The other stockholders, while occupying the position of directors, gave but little, if any, attention to the business, and were not aware of the condition of the company until it was about to be placed in the hands of a receiver. It was contended that by using proper care they might have ascertained the condition of affairs; having failed to do so they were guilty of negligence, and must therefore be regarded as having assented to the indebtedness. *It was held* that the liability under the statute must be predicated upon assent, and this must involve knowledge; without knowing that a thing exists one can not be said to assent to it. It is not sufficient that he neglects to do that which would

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lead him to knowledge. The statute does not impose a liability for mere negligence in not properly discharging the duty of an officer or director.

2. *Construction of Statutes—Directors' Liability—Assent Defined.*—Under Sec. 16, Ch. 32, R. S., providing that if the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers assenting thereto shall be personally liable, etc. *It was held* that to constitute an assent there must be a mental act on the part of the director or officer based upon some information or perception of facts. A mere failure to know or to take the steps, which, if taken, would bring the facts to light, will not suffice.

3. *Corporation—Duty of Directors.*—The duty of a director of an incorporated company requires him to know what the corporation is doing and it is negligence in him not to know; but it does not follow as a legal sequence that he is conclusively presumed to have known of its doings, and having made no objections, is to be considered as assenting to an excess of its indebtedness above its capital stock within the meaning of Sec. 16, Ch. 32, R. S., making the directors and officers liable for such excess to the creditors of such corporation. Such a construction would predicate the liability upon a mere neglect of duty in not keeping advised of the corporate action, whereas the ground of liability fixed by the statute is an assent to the excessive indebtedness.

Memorandum.—Suit to enforce the liability of directors under the statute against permitting the indebtedness of a corporation to exceed its capital stock. Appeal from a decree of the Circuit Court of Schuyler County; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANTS' BRIEF.

"The liability of the directors is, both in form and substance, a private obligation, similar in many respects to that of sureties."

"It is imposed by the legislature, partly for the purpose of inducing the directors to do their prescribed duties, and partly for the purpose of securing the company's creditors from losses caused by those who have control over the company's funds."

"The statute not being penal, but intended to afford additional security to creditors, it should be so construed as to effectuate that purpose without imposing punishment upon the officers, or hardship upon the creditors." *Wolverton et al. v. Taylor et al.*, (Ill.) 23 N. E. Rep. 1007; *Id.*,

132 Ill. 197; Horner v. Henning, 93 U. S. 228; Stone v. Chisolm, 5 Sup. Ct. Rep. 497; S. C., 113 U. S. 302.

WILLIAM STREET, solicitor for appellants.

APPELLEES' BRIEF.

Our own Supreme Court have expressly declared the liability of a director under this section to be, like a surety, *stricti juris*. Wolverton v. Taylor, 132 Ill 198. Statutes imposing these severe personal liabilities and obligations are uniformly construed strictly by the courts. Bruce v. Platt, 80 N. Y. 381; Gray v. Coffin, 9 Cush. (Mass.) 199; Child v. Boston & Fair Haven Iron Works, 137 Mass. 519; Chase v. Lord, 77 N. Y. 1; Allison v. Coal Company, 87 Tenn. 60; 1 Beach on Corp., Sec. 263; Griffith v. Green, 29 N. E. Rep. 938.

This statute is clearly in derogation of the common law, and all such statutes are invariably to be construed strictly. Thompson v. Weller, 85 Ill. 198; Canadian Bank v. McCrea et al., 106 Ill. 289; Knower v. Haines, 31 Fed. Rep. 512; Pollard v. Bailey, 20 Wall. (U. S.) 520; Fourth National Bank v. Franklyn, 120 U. S. 747; Roke v. Thomas, 56 N. Y. 559; Union Iron Co. v. Pierce, 4 Biss. (U. S. C. C.) 327; Irvine v. McKeon, 23 Cal. 472; 24 N. Y. 148; 46 Me. 377, and 3 Dutch. (N. J.) 148.

“On the long established doctrine of this court, as well as of other courts, the complainants could not prevail on the fact of substitution, if proved, as it was not alleged in the bill. They were not permitted to state a case in one way in their bill and make another and different case by the testimony.” Carmichael et al. v. Reed et al., 45 Ill. 108; McKay v. Bissett, 5 Gilm. (Ill.) 499; White v. Morrison, 11 Ill. 361; Rowan v. Bowles, 21 Ill. 17; Chaffin v. Heirs of Kimball, 23 Ill. 36; Tracy v. Rogers, 69 Ill. 622; Bremer v. Canal & Dock Co., 123 Ill. 104.

Judgments against the corporation are not evidence against the officers to prove the indebtedness of the corporation. Chase v. Curtiss, 113 U. S. 452; Miller v. White, 50

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N. Y. 137-141; Whitney Arms Co. v. Barlow, 63 N. Y. 62-72.

The mere fact of being a director was not, *per se*, sufficient to make a person liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to him. Arthur v. Griswold, 55 New York, 400; Percy v. Millaudon, 8 Martin (La.) N. S. 68.

W. L. VANDEVENTER, S. B. MONTGOMERY, DAVID H. GLASS,
L. A. JARMAN and WM. B. RAY, solicitors for appellees.

OPINION BY THE COURT.

The appellants filed their bill in chancery against the appellees to enforce an alleged liability as directors of the "Rushville Shawl Mills," a corporation, for assenting to corporate indebtedness in excess of the capital stock.

The cause was heard upon bill, answer, replication and proofs, and a decree was entered dismissing the bill at the cost of the appellants. By their appeal the record is now brought to this court.

The provision of the statute involved reads as follows:

"If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation." R. S., Ch. 32, Sec. 16.

Assuming, for the present purpose, that the indebtedness of the incorporation did exceed the capital stock, the question is whether the appellees, being directors, did assent thereto, within the meaning of the statute, so as to render themselves liable for such excess. It appears that the stock of the corporation was held mainly by one man, Augustus Warren, and that affairs of the corporation were practically under his exclusive management.

The appellees, while holding stock, and while occupying the position of directors, seem to have given but little, if any, attention to the business.

It is not shown by the proofs offered in support of the bill that they really knew the financial condition of the company, and they testify positively that they were not aware that the indebtedness exceeded the capital stock until it had all been incurred, and the affairs of the concern were about to be placed in the hands of a receiver.

The appellants insist, however, that by using the proper care, they might have ascertained the exact condition of the company at any time, and if they failed so to do, they were guilty of negligence, and must therefore be regarded as having assented to the indebtedness.

It may be fairly inferred from the evidence that the appellees were negligent in the discharge of their duties as directors; that they really took no active interest in the management of the business; that they permitted Mr. Warren to conduct it as he saw fit, without any supervision on their part; and that, by the exercise of proper diligence, they might have known, at all times, what was the state of affairs. If this makes them liable under the statute, the decree in their favor is erroneous.

The liability must be predicated upon assent, and this must involve knowledge; without knowing that a thing exists, one can not be said to assent to it.

It is not sufficient that he neglects to do that which would lead him to knowledge. The statute does not impose liability for mere negligence in not properly discharging the duty of an officer or director. It does not say liability shall arise where he has negligently permitted the indebtedness to exceed the capital stock, but when he has assented thereto.

There must be a mental act, based upon some information or perception of facts; but mere failure to know, or to take the steps which, if taken, would bring the facts to light, will not suffice.

The position of the appellants is, that the duty of a director requires him to know what the corporation is doing, and it is negligence in him not to know; hence, he is conclusively presumed to have known, and, having made no objection, he is to be considered as assenting.

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But this is more than the statute has declared.

It is an attempt to predicate liability upon mere neglect of duty in not keeping advised of the corporate action, whereas, the ground of liability, fixed by the statute, is that there was assent to the prohibited action. *Patterson v. Stewart*, 45 Minn. 84; *Patterson v. Robinson*, 36 Hun, 622.

We are of opinion the decree should be affirmed.

Crone v. Bane.

1. *Question of Fact.*—Where a fair question of fact is submitted to the jury, appellate courts are not disposed to interfere with their conclusions.

2. *Distress for Rent.*—A tenant sold his grain to S., who was a grain dealer, and had, from the proceeds, paid his landlord all that was due him, except \$200. The landlord claiming a lien upon the money requested S. to pay it to him; the tenant instructed S. to do so; under this state of facts *it was held*, that the landlord having a lien upon the money which was recognized by both S. and the tenant, and having asserted such lien, to which the tenant assented, it should be regarded as an appropriation of the money by the landlord, and before he can proceed against the tenant by distress for that amount he ought to show a failure, upon a reasonable effort, to get the money.

Memorandum.—Distress for rent. Appeal from a judgment for defendant rendered by the Circuit Court of Cass County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

This was an action brought by Henry Crone, landlord, against George Bane, tenant, for balance of rent due on March 1, 1892, for the sum of \$200 balance and \$18.16 interest upon a written lease made August 14, 1888, by and between said parties, beginning March 1, 1889, and ending upon March 1, 1892. Distress warrant issued March 15, 1892, for \$218.16; plea of non-assumpsit, verdict for de-

fendant. Motion to set aside verdict and for new trial overruled, and appeal.

J. N. GRIDLEY, attorney for appellant.

APPELLEE'S BRIEF.

The jury were warranted in finding against appellant as to the items of interest and the verdict will not be disturbed. *Hewitt v. Estelle*, 92 Ill. 218; *Kightlinger v. Egan*, 65 Ill. 131; *Power v. Cavanaugh*, 17 Brad. 77.

R. W. MILLS, attorney for appellee.

OPINION OF THE COURT.

This was a proceeding by distraint. Verdict and judgment for defendant. The landlord claimed a balance of \$200 on the rent for the last year and \$18 for interest on delayed payments for the preceding year. The last item was based mainly upon the clause in the lease which made the payment due when the crop was sold, and the plaintiff insisted that it was sold at a given date to one Hageman, while defendant insisted he did not sell to Hageman at all, but merely left it on deposit subject to further orders, and that the bailee converted the grain into money and absconded. It was a fair question of fact for the jury and we are not disposed to interfere with their conclusion on this point.

A very small part of the interest claimed was on a balance of \$28, as defendant states, which was not paid promptly. When it was paid, a short time after due, nothing was said about interest. In fact, the item is a mere trifle of a few cents only, and no doubt both parties considered it too small to be taken into account, and it should be so treated now in view of this action of the parties.

The item for \$200 was for the balance of rent on the last year. It is not averred this had been paid the plaintiff. It is insisted, however, that under the circumstances the plaintiff should not claim it of defendant. It appears that

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defendant sold his grain to one Savage, who was a grain dealer, and had from the proceeds paid plaintiff all that was due him except \$200. And it further appears, at least the evidence tends to show, that the plaintiff, claiming a lien upon the money, requested Savage to pay it to him, and that defendant, recognizing the fact that plaintiff might assert a lien upon the money, instructed Savage to do so.

This state of facts would certainly relieve defendant from the liability to plaintiff if Savage had agreed to pay and if the plaintiff had accepted him as his debtor.

Having a lien upon the money which was recognized by Savage as well as by the defendant, and having asserted the lien, to which defendant and Savage assented, we think it should be regarded as an appropriation of the money by plaintiff, and that before he can be permitted to proceed against defendant by distraint for that amount he ought to show a failure, upon reasonable effort made, to get the money.

By thus stopping it in the hands of Savage and substantially appropriating it himself he deprived defendant of his most efficient and only ready means of paying the debt.

He ought to account for what he has thus received, or by proper effort might have received, before calling upon the defendant.

The judgment seems to be quite responsive to the merits and it will be affirmed.

Argo et al. v. Oberschlake et al.

1. *Premature Delivery of a Deed under a Decree—Rights Thereunder.*—Where, under a decree of sale, it was provided that the purchaser at the sale was not to receive possession nor title until February 1st, following the sale, the sale of the premises under the decree was made October 31st, and approved December 7th. On December 14th the purchaser induced the master to deliver to him the deed under the decree, giving him as payment of the purchase money a certified

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81 574

check upon a bank, conditioned that it was not to be presented until February 1st. Upon receipt of the deed the purchaser demanded the rent of the premises and being refused, brought replevin. *It was held*, that the purchaser took nothing by the premature delivery of the deed in addition to his rights under the decree and that he was not entitled to the rents; that the delivery of the check to the master was not a payment but an order for the payment of the money at a future day; that the certificate of the officials of the bank upon which it was drawn, that it would be paid, added only security for the payment to the extent of the solvency of the bank.

2. *Delivery of a Deed Essential.*—The delivery of a deed is essential to the conveyance of land. It is the final act of conveyance and without it all other formalities are ineffectual. Even though executed, a deed has no effect to pass title unless delivered, and it takes effect not from the date of its execution, but from the date of its delivery.

Memorandum.—Replevin. Appeal from a judgment for defendants rendered by the Circuit Court of De Witt County; the Hon. LYMAN LACEY, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANTS' BRIEF.

This being a judicial sale, without redemption, and without any reservation of accruing rents in either of the decrees, or otherwise, such rents passed to the purchasers at the sale. *Dixon v. Nicholls*, 34 Ill. 372; *Epley v. Eubanks*, 11 Ill. App. 272; *Desselhorst v. Cadogan*, 21 Ill. App. 179; *Foote v. Overman*, 22 Ill. App. 181.

Ample authority was conferred upon the master to deliver the deed at the time it was delivered. And even if there was some irregularity about that, it could not be questioned in this collateral proceeding. *Nichols v. Mitchell*, 70 Ill. 259; *Mulford v. Beveridge*, 78 Ill. 455; *Hobson et al. v. Ewan*, 62 Ill. 146; *Lane v. Bommelmann*, 17 Ill. 95; *Rigg v. Cook*, 4 Gil. 336.

It was not necessary to show an order approving of the master's report of deed. *McHany v. Schenk*, 88 Ill. 357.

R. A. LEMON, attorney for appellants.

FULLER & INGHAM, and MOORE & WARNER, attorneys for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was replevin brought by the appellants to recover a quantity of rent-corn grown upon premises purchased by them on the 31st day of October, 1891, at a sale by the master in chancery, under a decree in a proceeding in partition, rendered at the August term, 1891, of the DeWitt Circuit Court, ordering the lands to be sold upon the following terms and conditions, to wit:

“Ten per cent of the purchase money to be paid cash in hand, the balance to be paid on the 1st day of February, 1892, without interest. Deed to be delivered upon payment of the purchase money.”

A portion of the rent-corn had been, before the day of sale, gathered and stored in cribs on the premises, and the tenant was, on the day of sale, still engaged in gathering and storing the corn in such cribs, as he was required to do by his contract with the appellees, the owners of the lands. After the sale, the tenant continued to so gather and store the corn until about Christmas, at which time it was all gathered.

On the day of the sale, the appellants paid the master ten per cent of the amount of their bid for the lands.

The sale was reported to and approved by the court on the 7th day of December.

On the 14th day of December, the appellants induced the master to deliver to them a master's deed for the lands, and to accept, as payment of the purchase money, a check, or order, drawn by the appellants upon a bank, conditioned that such check was not to be paid until the 1st day of February. Immediately after thus securing the deed, the appellants demanded that the rent-corn be delivered them. The tenant refused to allow them to take the corn, and began to deliver it to the appellees, the owners of the land at the time of the rendition of the decree, whereupon the appellants instituted this action to recover the corn, and being defeated in the Circuit Court, bring this appeal.

The law charged the appellants with notice of the provisions of the decree under which they purchased the lands.

Aside from this, the proof shows that they had actual knowledge of such provisions before bidding at the sale.

This decree provided for final payment of the purchase money and delivery of the master's deed on the 1st of February. We do not think this provision was inserted merely for the purpose of securing the payment of the money. Its purpose was to fix a time when title, under the decree, should vest in the purchaser at the sale.

The appellants did not, as they well knew, become vested with the title by the bid on the day of sale, nor by the confirmation of the sale by the court. The delivery of a deed to them was necessary to invest them with title, and it is apparent they well knew this.

The delivery of a deed is essential to the conveyance of land. It is, in fact, the final act of conveyance and without it all other formalities are ineffectual.

Even though executed, a deed has no effect to pass title unless delivered, and it takes effect not from the date of its execution but from the date of its delivery. Devlin on Deeds, Secs. 260 and 264.

The decree was, we think, framed in view of these legal rules, and, as we construe it, a retention of the title in the appellees until February 1st, with all of the legal consequences thereof, was intended to be effected by the peculiar provisions of the decree. Under it the purchaser at the sale was not to receive possession nor title until February 1st. Appellants, fully understanding that a deed was necessary to vest them with title and the rights of ownership, sought therefore to obtain a deed before the rent-corn could be delivered. In this they succeeded, and secured a deed, not only before the time fixed by the decree, but also without payment of the balance of the purchase money, as required by the decree. The delivery to the master of the check of appellants upon a bank for the payment of money on the 1st of February was not a payment. The check was but an order for the payment of money at a future time, and the certificate of the officials of the bank that it would be paid at such future date added only security for the payment to the extent of the solvency of the bank.

The master had only a naked power to strictly execute the decree of the court. We do not think he had authority to accept such certified check, payable at a future date, as a payment, and deliver the deed. We, in fact, think the appellants were not entitled to a deed until the expiration of the time fixed by the decree; but certainly they were not entitled to have the deed in advance of the time fixed for the payment of the balance of the purchase money and delivery of the deed without paying such balance.

They did obtain the deed before February 1st, without paying the money or ever proposing to pay it until 1st of February.

The appellants can only claim, under the deed thus obtained, such rights and interest as they would and should have been invested with under a deed delivered to them at the time provided for by the decree.

A deed delivered to them on the 1st of February would have given them no right to this corn. It is suggested that the deed should relate back from the time of its delivery to the day of the sale, or to the time of the confirmation of the sale by the court, and thus confer upon appellants a right to the corn as accrued rent.

This principle has been, at times, applied, but only when necessary for the furtherance of justice. Devlin on Deeds, Vol. 1, Sec. 264. We think the appellants knew when they bid at the master's sale that they were bidding for a right to the title to the land and possession thereof on the 1st of February, and that they knew and well understood that matured accruing rents, then partially severed from the land, would be wholly severed and removed before their right could or should attach.

There is, therefore, no reason for the application of the rule which would carry the effect of the deed back to the date fixed for its delivery by the decree.

We think the judgment is right in law, and upon the merits of the case. It must be affirmed.

Colby v. McGee.

1. *Action for Slander.*—Slander is a malicious wrong, and an action for it has as legitimate a standing in the courts as any other action.

2. *Charge of Adultery.*—Words imputing a charge of adultery are not actionable in themselves at common law, and an action for the speaking of such words could only be maintained by averring and proving special damages.

3. *Malice Implied at Common Law.*—Malice is implied at common law from the speaking of actionable words, and general damages follow as a legal inference.

4. *Malice Implied under Statutes, etc.*—Malice is likewise to be implied from the speaking of words made actionable by statute. The effect of the statute is to increase the number of actionable words from all of which malice is to be alike implied, and recovery allowed without proof of special damages.

5. *General Damages.*—General damages include exemplary or vindictive damages.

Memorandum.—Action for slander. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

Appellee in her declaration charges appellant with slander. The allegations, are: That on the 25th of March, 1888, in the presence of divers persons, appellant did falsely and maliciously speak of appellee the following words: "Clara isn't decent, and isn't what I thought she ought to be. Al had the mumps and they went down on him. Their first child is, in my opinion, either Charlie Turner's or Charlie Harrah's."

The appellant interposed pleas of general issue and of the statute of limitations. There were three trials. A mistrial, a new trial and the one here appealed from.

APPELLANT'S BRIEF.

In principle, there is an essential difference between slanderous words actionable *per se* at common law, and slander

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deemed actionable by our statute. S. & C. Chap. 126, Sec. 1. At common law, the words that are actionable *per se*, falsely charge a party with the commission of some indictable offense. Townshend on Libel and Slander, Sec. 146; Cooley on Torts, 196. The slander "deemed actionable" by our statute does not necessarily include the element of falsely charging a criminal offense. If the alleged charges were true, they would not subject the defendant in error to an indictment. *Miner v. The People*, 58 Ill. 59; *Deppe v. The People*, 9 Brad. 349.

This distinction between the common law and statutory slander, produces different legal results. In the one case malice is implied and injury presumed and exemplary damages may be awarded; while in the latter, damages must be proven. *Starkie on Slander*, 192; *Townshend on Slander* 309; *Holmes v. Holmes*, 64 Ill. 294.

GEORGE F. WICKENS, attorney for appellant.

BUCKINGHAM & SCHROLL, and W. C. JOHNS, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was an action for slander brought by the appellee against the appellant, resulting in a judgment against the appellant in the sum of \$500 upon trial before jury. The speaking of words amounting to a charge that appellee had been guilty of adultery was the slander complained of.

The only errors assigned are that the second and seventh instructions given for the appellee are erroneous and that the verdict was against the weight of the evidence in this, that under the weight of the evidence the action was barred by the statute of limitations.

The second instruction defines slander as a malicious wrong and declares that an action for slander has as legitimate a standing in courts as any other action. The seventh instruction relates to the rule for the assessment of damages if the defendant is found guilty and advises the jury that

they are not confined to merely compensatory damages but may, if they believe from the evidence that the defamatory words as charged were spoken maliciously or wantonly, award damages by way of punishment to the defendant and as an example to others.

It is contended that these instructions considered together tell the jury that if the speaking of the words be proven malice is to be inferred, and no actual damages need be proven, but that vindictive damages may be properly allowed; while appellant insists that as the words charged were actionable only by the statute, that damages to be allowed must be proven and that malice is not inferred.

Words imputing a charge of adultery were not actionable at common law *per se*, and an action for the speaking of such words could only be sustained under the common law by averring and proving special injury or damage from the use of the words. To remedy this unsatisfactory, and, as some authors have denominated it, barbarous state of the law, the legislature of our State by special statutes, made such words actionable. Sec. 1, Chap. 126, Rev. Statutes.

Malice was implied at the common law from the speaking of actionable words, and general damages followed as a legal inference. General damages included exemplary or vindictive damage. Newell on Slander, Sec. 1, 2 and 8, Chap. 26.

Malice is likewise, we think, to be implied from the speaking of words made actionable by statute. The effect of this statute is to increase the number of actionable words, from all of which malice is to be alike implied and recovery allowed without proof of special or actual damage. Newell on Slander, Sec. 1, Chap. 7.

Words imputing guilt of adultery were made actionable by Sec. 1 of Chap. 101 of our statutes of 1845, and our Supreme Court in *Hosley v. Brooks*, 20 Ill. 115, ruled that malice was to be implied from the use of such words and also in the same case upheld an instruction which authorized the imposition of damages by way of punishment.

If we are right in the views expressed the instructions are not open to the objections urged against them.

Whether the action was barred by the statute of limitations depends upon the time of the speaking of the words. This was purely a question of fact. The evidence bearing upon it was conflicting and its determination involved the credibility of some of the witnesses. It is the peculiar province of a jury to settle such a contention, and there is no reason appearing upon an examination of the testimony why we should interfere with the conclusion reached by the jury in this case.

The judgment must be and is affirmed.

Singer Manufacturing Co. v. Leeds.

1. *Explanation of Arbitrary Signs in Account Books.*—It is error to refuse to permit a party to explain the use of signs and peculiar forms of entry appearing in account books admitted in evidence.

2. *Contracts—Waiver of Conditions.*—In a printed form of contract between a company and an agent for the sale of its goods, was this clause: “It is also agreed and understood that no agreements outside of this printed form, or differing from it, shall be of any binding force unless they are confirmed by the said first party’s agent at Chicago, Illinois.” *It was held*, that the agent who negotiated and procured the signature to the contract in question, not being the agent in Chicago, had no authority to bind the company by waiving this condition of the contract, or to make any agreement different from or outside of the printed form of the contract.

Memorandum.—Action of assumpsit. Appeal from a judgment for \$77.85, in favor of the plaintiff, rendered by the Circuit Court of Pike County; the Hon. JEFFERSON ORR, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

APPELLANT’S STATEMENT OF THE CASE.

This was an action of assumpsit, originally commenced by appellee before a justice of the peace, to recover from the Singer Manufacturing Company a claim for commissions due and accruing to him on sales of sewing machines made by him as agent of the company. He claimed that the company was indebted to him in the sum of \$140.65, viz.: \$80.65 commissions accrued, and \$60 accruing commissions.

The company denied the indebtedness and claim that the plaintiff was indebted to it for cash collected and not accounted for, machines sold and unaccounted for, a board bill assumed and paid by the company, and for refunds and reverted sales, etc., etc.

The plaintiff sought to support his claim by a book account, purporting to be a book of original entries, and made in the ordinary course of business.

The company denied the accuracy of the book and sought to impeach the same by its own books, and to maintain counter claim.

The case was tried by a jury, on appeal to the Circuit Court, and a verdict rendered assessing the plaintiff's damage at \$77.85.

APPELLANT'S BRIEF.

Entries must be transferred from the scratch book or slate recently after the transactions, and while the same are still fresh in the memory. *Bedlich v. Baurlee*, 98 Ill. 134; *Greenleaf on Evidence*, Sec. 115, 117, 118.

A book account is not admissible unless the items are contemporaneous with the transactions. *Hisey v. Goodin*, (Mo.) 7 West. Rept. 117. The entries must be made in the ordinary course of business. *Beyer v. Sweet*, 3 Scam. 120; *Ruggles v. Gatton*, 50 Ill. 412; *Kibbe v. Bancroft*, 77 Ill. 18. Where the books are complicated and extensive, proof of balance and general results is proper and should be admitted. *Phillips on Ev.*, 4th ed., p. 594; *Smith v. Peoria*, 59 Ill. 412. A statement being rendered without objections being made is evidence of account stated. *McCord et al. v. Manson*, 17 Ill. App. 118.

W. E. WILLIAMS, attorney for appellant.

EDWARD YATES, attorney for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*
The appellee recovered a judgment against the appellant

for \$77.85 from which the latter has prosecuted its appeal to this court. The plaintiff's claim was for commissions accrued and accruing upon sales of sewing machines manufactured by defendant. The defendant denied the alleged indebtedness and set up a counter claim against plaintiff for cash collected and not accounted for, machines sold and not accounted for, etc.

We shall not go into a statement of the facts nor need we refer to all the points suggested by counsel in their printed arguments.

We think the court erred in refusing to permit the defendant to explain the meaning of certain arbitrary signs and peculiar forms of entry appearing in the account books of defendant which were admitted in evidence. Without such explanation the books would be of little, if any, use.

We think also the court erred in assuming, by instructions given for plaintiff, and by modifying instructions asked by defendant, that the company had waived the clause of the written contract in regard to refunding sums received by plaintiff on reverted sales. As we read the evidence there was nothing upon which to base such assumption. From the evidence of the plaintiff it appeared that he relied upon the declarations of one Dewell, who was an agent of the company, supervising manager for the county, for authority to disregard that clause of the contract. It is provided by the contract that no agreements differing therefrom or outside of it should be of binding force until confirmed by the company's agent in Chicago.

It appears that Dewell was the agent who employed the plaintiff and brought for signature this written contract, but he was not the agent in Chicago. It is claimed by plaintiff that he declared he would not insist on enforcing the clause in regard to the item in question. He says that he had this understanding from declarations made before and after the signing of the contract.

Whatever was said before was of course merged in the contract. We are inclined to believe from the entire evidence of plaintiff that this understanding, if any there was

between him and Dewell, occurred at the time the contract was signed and was really a part of the negotiations between the two men.

The plaintiff's testimony in chief was not very clear on the point, and on cross-examination he was asked, "Was not this talk at the time you signed it?" A. "After I signed, I asked him what contract it was, and he says, 'Here it is, put your name to it.' I said, 'What about this revert clause?' He said, 'I don't exact that from anybody.'" Considering all his testimony together we think this so-called agreement of waiver is to be regarded a part of the negotiations which were merged in the contract. It meant, "You sign this as it is written and I will not insist upon this clause," and it was signed with that understanding. The effect is to contradict the writing by evidence of a contemporaneous parol agreement, which is not admissible.

It is urged, however, that the proof shows a subsequent agreement waiving this clause. The contract in terms provided that no outside agreement differing therefrom should be made unless confirmed by the agent in Chicago. This was a clear negation of the power of the agent, Dewell, who presented the contract to the plaintiff, to make any such agreement.

It would not do to say that Dewell might, by his own declaration, establish his authority to set aside a clause of such importance. While it is true the company might waive this provision, the proof of waiver can not rest upon the bare assertion of an agent in conflict with the express terms of the writing, thereby overriding a provision which clearly showed he had not the power he assumed to have. To permit such proof would open a wide door to fraud. Before it can be held that this clause has been waived it must appear that the acts of the company through its authorized agents have been such as should estop it from insisting upon the clause, and as we have just said, the company can not be bound by the mere declaration of Dewell that he would not do so.

Manifestly he had no power to make such an agreement

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for the company, and we do not find that the company, by its acts through any authorized agent, is estopped to enforce the contract as written.

Complaint is also made by appellant as to the refusal of the court to give instructions number nine and ten. These instructions merely advise the jury as to the meaning of the clauses in regard to note sales and lease sale—and no good reason appears why they should not have been given as asked. The clauses referred to are, however, quite clear, and it is difficult to see how a jury could misread them or reach a wrong conclusion because not advised as to their proper construction.

We can not, therefore, say that the case should be reversed for such refusal, but on another trial the court will no doubt obviate the complaint.

The judgment will be reversed and the cause remanded.

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1. *Verdict Against the Weight of Evidence.*—When the plaintiff alleges certain facts in his declaration as the grounds of the negligence complained of, in order to recover, he must prove the said allegations by a preponderance of the evidence.

2. *Plaintiff Must Be in the Exercise of Ordinary Care.*—In an action for personal injuries, it is incumbent upon the plaintiff to show that at the time, etc., he was himself in the exercise of ordinary care.

Memorandum —Action for personal injuries. Appeal from a judgment of \$2,000 in favor of the plaintiff, rendered by the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

On July 24, 1891, the plaintiff, driving a horse and buggy and traveling in a westerly direction, was struck by an engine of the defendant running south at a road crossing, about a mile west of Havana, Illinois. The horse was killed

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and plaintiff injured. This is an action of trespass to recover for such injuries. The plaintiff claimed \$10,000, and by the verdict of the jury and judgment of the court, recovered \$2,000.

The plaintiff charges the defendant with negligence in not causing a whistle to be blown or bell rung for the distance of eighty rods before reaching said crossing; and in not having at the crossing a sign board; and in suffering and permitting brush and weeds to grow on the right of way, so near and so high as to prevent a person approaching the crossing from seeing or hearing a train; that the engine and train was run at a high and rapid rate of speed; that the brakeman was asleep; that the engineer did not reverse the engine or use any effort to prevent the collision; that the steam whistle was out of repair; that no bell-rope was attached to the bell; that no steam or other brakes were on said engine or tender; and that there was no lever attached to said engine, whereby the engineer could reverse the same; and that while using "all due care and caution" to prevent injury to himself and property in going upon said crossing, the engine by reason of the negligence "aforesaid," struck and injured him.

APPELLANT'S BRIEF.

The burden of showing that he exercised "due care and caution" to avoid injury is upon the plaintiff, and the recovery can not be sustained unless it appears from a preponderance of the evidence that he did exercise such "due care and caution." *I. & St. L. R. R. Co. v. Evans*, 88 Ill. 63.

"If a traveler on the highway takes the risk of crossing a railroad track, without using reasonable care to avoid accident, and is injured, he must bear the consequences of his own imprudence." *W., St. L. & P. Ry. Co. v. Hicks*, 13 Brad. 408; *C., B. & Q. R. R. Co. v. Damerell et al.*, 81 Ill. 450.

If the plaintiff's injury was not caused by the negligence of the defendant as charged in the declaration, there can be no recovery. *I. C. R. R. Co. v. Benton*, 69 Ill. 174; *C., B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510.

"When the evidence is conflicting, and the merits of the

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case doubtful, the instructions of the court upon the law applicable to the points involved must be strictly accurate, or the judgment will be reversed." *Singer Mfg. Co. v. Pike*, 12 Brad. 506; *C., B. & Q. R. R. Co. v. Daugherty*, 110 Ill. 521; *St. L. & C. R. R. Co. v. Moore*, 14 Brad. 510; *P., D. & E. Ry. Co. v. Wagner*, 18 Brad. 598.

GRAY & WAGGONER, attorneys for appellant.

APPELLEE'S BRIEF.

A railroad company is bound to know where all the places of danger to human life and the loss of property are, along the line of their road, and the employes of the company must use care and diligence commensurate with the dangers attending such places of danger. *C., B. & Q. R. R. Co. v. Payne*, 59 Ill. 534 and 541; *R. R. I. & St. L. R. R. Co. v. William Hillmer*, 72 Ill. 235; *C., B. & Q. R. R. Co. v. Lee*, 87 Ill. 454; *P. P. & J. R. R. Co. v. Siltman*, 88 Ill. 532.

The question of whether the appellee used ordinary care, or that care enjoined upon him under the existing and surrounding circumstances at the time he was injured, was one of fact purely, for the jury to determine, and not a question of law. *R. R. Co. v. Haworth*, 39 Ill. 346; *R. R. Co. v. O'Connor*, 119 Ill. 597; *R. R. Co. v. Pennell*, 94 Ill. 455.

"When it is once admitted or established by the evidence, and sufficiently shown, that signals were not given, as required by the statute under such circumstances, the verdict of the jury is supported by the evidence on the theory that the negligence of the appellant's servants was gross as compared with that of the appellee, which was slight." *R. R. I. & St. L. R. R. Co. v. William Hillmen*, 72 Ill. 235; *Board of Trustees v. Joshua L. Misenheimer et al.*, 89 Ill. 151; *Grimes v. Butts*, 65 Ill. 347; *Seibel v. Vaughan*, 69 Ill. 257; *Fuller v. Bates*, 6 Brad. 442.

I. R. BROWN, attorney for appellee.

OPINION BY THE COURT.

The plaintiff below was awarded a verdict and judgment

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in the sum of \$2,000 for injuries sustained by reason of a collision with the train of defendant at a highway crossing.

The grounds of negligence alleged in the declaration were that no signal was given of the approach of the train, that the train was otherwise negligently operated and that the right of way was obstructed by a heavy growth of weeds and bushes so as to shut off the view of one approaching the highway crossing.

The evidence is quite voluminous, and counsel have argued the case from their respective standpoints. It would take more time and space than is thought necessary to state in detail or even in a general way the testimony as it appears in the abstract.

It is quite apparent to us that the great preponderance of the evidence is with the defendant on the question whether the proper signals were given of the approach of the train. Indeed, there is scarcely any room to doubt that they were given. Nor is there sufficient proof of negligent management of the train in any other respect.

There was proof, however, that upon the right of way weeds and bushes had grown to such an extent as to greatly obstruct the view, and if the case turned upon this point the finding for plaintiff might stand.

But we think it is not the material question in the case. The accident occurred at night, and the presence of these obstructions was not very important. The signals being given, as they undoubtedly were, the plaintiff, had he exercised proper caution, would have known the train was approaching, and to the signals was added the noise and roar caused by passing over a long bridge, which ended some 200 feet or more beyond the crossing.

It is difficult to understand how the plaintiff could have failed to hear all this if he was duly sober and careful of his own safety. Unfortunately for him there is no little evidence that he was considerably under the influence of liquor which, if true, would account for his action.

It would seem that the plaintiff insisted before the jury that the weeds and bushes on the right of way obstructed the sounds of the approaching train, as well as the view,

Graybeal v. Gardner.

for we find in the instructions for plaintiff a suggestion to that effect. There is no such allegation in the declaration and it seems unreasonable in the highest degree that the plaintiff was by such means prevented from hearing the train or its signals.

Such obstructions might obscure the view but would not prevent the passage of sound in any appreciable degree.

So far as the instructions contained such intimation they were misleading and erroneous. The first instruction was faulty in assuming or intimating that the plaintiff was guilty of but slight negligence in going upon the track when greatly under the influence of liquor and in failing to require as an essential element of the plaintiff's case that he was in the exercise of ordinary care. Regarding the whole case as it appears in the record, we are of opinion that the court erred in refusing the motion for a new trial. The judgment will be reversed and the cause remanded.

Graybeal et al. v. Gardner et al.

1. *Mental Capacity of Deceased Testator.*—Where the testimony upon the mental capacity of a deceased testator is voluminous and conflicting, and sufficient evidence appears to support the finding of the jury, it will not be disturbed.

2. *Instruction Assuming Facts.*—An instruction which assumes that a testator signed a will where the bill alleges that he executed the instrument claimed to be his will, the attesting witnesses testified that he signed it, and the fact that he did so is in nowise disputed, can not be regarded as erroneous.

3. *Misconduct of Jurors—Use of Intoxicating Liquors.*—Where, upon a motion for a new trial, the court is satisfied from the affidavit read that none of the jurors drank liquor in sufficient quantity, or at such times during the progress of the trial as to affect the verdict, a new trial will not be granted.

Memorandum.—Bill in chancery to contest a will. Appeal from a decree of the Circuit Court of Fulton County, dismissing the bill; the Hon. JEFFERSON ORR, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANTS' STATEMENT OF THE CASE.

This was a bill filed by appellants in the Circuit Court to set aside the will of Harrison Putnam, who died June 18, 1891. The will was executed April 8, 1890, and was presented to the County Court for probate, and probate refused. On appeal to the Circuit Court, it was admitted to probate.

The bill alleged that said Harrison Putnam was not of sound mind and memory at the time of the execution of the alleged will, and an issue was submitted to the jury as follows:

"Was the paper propounded as the last will and testament of Harrison Putnam, deceased, the last will of said testator or not?"

The jury returned a verdict in favor of defendants, and appellants moved for a new trial, which being denied, a decree was entered dismissing the bill, from which appellants prosecute this appeal.

Copy of the decree appealed from:

"The court having heard the arguments of counsel, and being fully advised in the premises, doth find that the said will has been proven to the satisfaction of the court. It is therefore ordered, adjudged and decreed that said will and testament be and the same is duly probated, etc. * * *

JEFFERSON ORR, Judge."

APPELLANTS' BRIEF.

The definition of competency is quoted approvingly by the Supreme Court of this State in *Campbell v. Campbell*. 130 Ill., at page 467, from Lord Kenyon: "Having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it, if he had a power of summoning up his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will." Applying this definition, was Harrison Putnam at the time this paper purporting to be his last will was

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executed, capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? *Stevens v. Vancleve*, 4 Wash. C. C. 262; *Harrison v. Rowan*, 3 Wash. C. C. 385; *Hall v. Hall*, 18 Ga. 40; *McMasters v. Blair*, 29 Penn. St. 398.

“Something more is required than a mere passive memory. There must be an active power to collect and retain the elements of the business to be performed for a sufficient time to perceive their obvious relations to each other.” *Converse v. Converse*, 21 Vt. 168.

On adjournment over Sunday, two jurors borrowed a horse and wagon from the attorney of prevailing party to go home. This was held to be cause of reversal. *Ensign v. Harney*, 15 Neb. 330.

It has been held, drinking liquor by jury of their own procurement would not, *per se*, invalidate the verdict. But see *Jones v. State*, 13 Tex. 168; *Davis v. State*, 35 Ind. 496; *Ryan et al. v. Harrow et al.* 27 Iowa, 494.

That the courts will guard against the appearance of evil, and set aside a verdict where there might be room for suspicion, see *Cottle v. Cottle*, 6 Greenleaf, 140; *Knight v. Inhabitants of Freeport*, 13 Mass. 218; *Pool v. C., B. & Q. R. R. Co.*, 6 Fed. Rep. 844; *People v. Gray*, 61 Cal. 164.

Any association of any kind by either party, or the counsel of either party, to a cause on trial, with any one of the jurymen, is calculated to give rise to suspicion and uncertainty as to the fairness of the verdict. The sense of obligation for a favor received is a subtle emotion, and often unconsciously dominates the faculties. It is better that a jurymen rest under no obligation to either of the parties upon whose rights he is called upon to adjudicate. *M. & O. R. R. Co. v. Davis*, 130 Ill. 146; *Bonnet v. Glattfeldt*, 120 Ill. 166; *Martin v. Morelock*, 31 Ill. 485; *Lyons v. Lawrence*, 12 Brad. 531; *Stafford v. City of Oskaloosa*, 57 Iowa, 748; *Doud v. Guthrie*, 13 Brad. 653.

H. W. MASTERS & SON and GRAY & WAGGONER, solicitors for appellants.

APPELLEES' BRIEF.

A will can not be impeached for the injustice or impropriety of its provisions. *Kimball v. Cuddy*, 117 Ill. 213. A testator of sound mind and memory, has a right to leave his estate to whom he pleases. *Freeman v. Easily*, 117 Ill. 322; *Schneider v. Manning*, 121 Ill. 385; *Anderson v. Irwin*, 101 Ill. 411.

Where there is a conflict in the testimony touching the facts upon which the validity of the will depends, this court will not reverse the decree of the lower court, if the evidence of the successful party, when considered alone, is clearly sufficient to sustain the verdict. *Moyer v. Swygart*, 125 Ill. 262; *Long v. Long*, 107 Ill. 210; *American Bible Society et al. v. Price*, 115 Ill. 623.

Affidavits of jurors can not be used to impeach their verdict, except in a case where a part of the jurors swear that they never consented to the verdict, but the affidavits of jurors may be used for the purpose of supporting their verdict. *Smith v. Eames*, 3 Scam. (Ill.) 76; *Forrester v. Guard, Breese* (Ill.) 74; *Martin v. Ehrenfels*, 24 Ill. 189; *Allison v. The People*, 45 Ill. 37; *Reed v. Thompson*, 88 Ill. 246; *Peck v. Brewer*, 48 Ill. 55; *Baldwin v. Smith*, 82 Ill. 162; *Pope v. The State*, 36 Miss. 121; *State v. Sparrow*, 3 Murph. (Tenn.) 487; *Richardson v. Jones*, 1 Nev. 405; *Wilson v. Abrahams*, 1 Hill (N. Y.) 207; *Dennison v. Collins*, 1 Cow. (N. Y.) 111; *Thompson's Case*, 8 Gratt. (Va.) 637; *Purinton v. Humphries*, 6 Greenl. (Me.) 379; *Commonwealth v. Roby*, 12 Pick. (Mass.) 496; *Rowe v. State*, 11 Humph. (Tenn.) 491; *Stone v. State*, 4 Humph (Tenn.) 27; *Gilmanton v. Ham*, 38 N. H. 108 (overruling *State v. Bullard*, 16 N. H. 139); *United States v. Gilbert*, 2 Sumn. 83; *Davis v. The People*, 19 Ill. 77; *Russell v. State*, 53 Miss. 368; *Roman v. State*, 41 Wis. 312; *State v. Canfield*, 23 La. 146; *Van Buskirk v. Daugherty*, 44 Iowa, 42 (overruling *Ryan et al. v. Harrow et al.*, 27 Iowa, 494); *State v. Upton*, 20 Mo. 397; *Duke of Richmond v. Wise*, 1 Ventr. 125; *Perry v. Baily*, 12 Kan. 539; *Wilson v. Abrahams*, 1 Hill (N. Y.), 211; *O'Neill v. Keokuk, etc., Ry. Co.*, 45 Iowa, 546; *Kee v. The*

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State, 28 Ark. 155; Koehler v. Cleary, 23 Minn. 325; C., M. & St. P. R. R. Co. v. Kreuger, 23 Brad. 643; Stampofski v. Steffens, 79 Ill. 303; C. E. & I. R. R. Co. v. Holland, 13 N. E. Rep. 145.

“A new trial will not be granted where the evidence of the party having influenced the jury is slight.” McCausland v. McCausland, 1 Yeates (Pa.), 372; Moore v. Edminston, 70 N. C. 471.

Verdicts in contested will cases stand on the footing of verdicts at law, on application for new trials. Shevalier v. Seager, 121 Ill. 566; American Bible Society v. Price, 115 Ill. 630.

Although there may be trivial errors in some of the instructions given, a verdict will not be set aside, which manifestly does justice between the parties. Phoenix Ins. Co. v. La Pointe, 17 Ill. App. 250; Murry et al. v. Haverly et al., 70 Ill. 318; Reynolds v. Greenbaum, 80 Ill. 416; Wiggins Ferry Co. v. Higgins, 72 Ill. 518; Stickle v. Otto, 86 Ill. 161; Race v. Oldridge, 90 Ill. 250; Mansfield v. Moore, 124 Ill. 136.

D. ABBOTT and GRANT & CHIPERFIELD, solicitors for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was a bill in chancery filed by the appellants to contest the will of Harrison Putnam, deceased. Probate of the will had been refused by the County Court but was granted by the Circuit Court on appeal.

The bill alleged that the appellants were grandchildren of the testator but not named as legatees or otherwise in the will, and charged that the deceased was not of sound mind or memory when the will was executed. The issue as to the mental capacity of the testator was made by the pleading and submitted to a jury, tried, and a verdict that the deceased was of sound and disposing mind, returned; a decree dismissing the bill followed, from which this appeal.

The admission in evidence of the decree of the Circuit

Court admitting the will to probate is assigned as for error; that the Circuit Court did so adjudicate is averred by the appellants in their bill. Without an averment of the probate of the will the bill would have had no standing in court. The decree showing its probate did not prove more than the appellants admitted to be true.

We perceive nothing in the wording of the decree bearing upon the issue of fact submitted to the jury, and think its admission harmless, whether proper or not.

The testimony as to the mental capacity of the deceased is voluminous, and of course conflicting. We are satisfied from an examination of the record that there is sufficient proof to support the finding of the jury.

It is complained that the instruction given for the appellees assumes that the testator signed the will. The bill alleges that the deceased executed the instrument claimed to be his will. That he signed it, was proven by the two attesting witnesses, Walker and Kriske, and that fact is in no wise disputed or questioned. The assumption of fact conceded by the pleading and established by proof, without contradiction, can not be regarded as erroneous or hurtful.

The jury were, we think, correctly instructed as to the mental capacity and soundness of mind requisite to the making of a valid will, and also as to upon whom the burden of proof rested.

The modification of instructions No. 4 and 5, asked by appellants, was proper, and the instruction that was refused ought not, we think, have been given. It is argumentative and suggestive, and contains nothing that ought to have been given that is not found, substantially, in other given instructions.

One of the grounds upon which a new trial was asked, and which is urged as ground of reversal, is the alleged misconduct of two of the jurors. The misconduct charged is that two of the jurors, at times when court stood adjourned at the noon hour or over night, upon one or more of the several days during which the trial of the case was in progress, drank spirituous liquors furnished by relatives of some of the

appellees. It is not claimed that liquor was drunk by any juror in the court or jury room, or while deliberating upon a verdict, or that either juror was at any time intoxicated to any noticable extent, or even to any extent.

The suspected jurors denied, under oath, the charge against them, and many affidavits pro and con were presented and read to the court.

It is manifest from the number of these affidavits that the court encouraged a thorough investigation and that the parties were diligent in searching for and producing affidavits. The unsatisfactory nature of proofs made by *ex parte* affidavits is universally recognized, and is well exemplified in the case by the second affidavit of R. L. Bocock, taken by the appellees, in which he states that there are in his first affidavit, presented by the appellants, quite a number of errors and mistakes of facts, and recitals directly to the contrary of what he intended to state.

The presiding judge patiently heard and considered all that was presented, and arrived at the conclusion that the offense charged against the jurors was not proven.

We have also carefully read these affidavits and are fully satisfied that neither of the jurors drank liquor in sufficient quantity or at such time during the progress of the trial as to at all affect the verdict. Such liquors as they did drink were drunk at times when the court stood adjourned upon one or more of the several days during which the trial was in progress, and not at a time the effect of the liquor could have been felt by the jurors when considering of the verdict. There is no ground for a reasonable suspicion that the drinking clouded or in the least affected the mind of either of the jurors. The proofs as to who furnished the liquor, and whether the jurors knew from whence it came, was contradictory and by no means satisfactory. The trial judge held that the alleged misconduct was not proven.

Upon a question of this kind we think the discretion of the trial judge is largely involved. His opportunities for arriving at a correct conclusion as to the acts and motives of the jurors and the parties are so much better than ours

can be that we do not feel warranted in saying that he was wrong. We think it clear from the evidence that the will in question was the will and wish of the testator and that he was competent to make a valid will. And in short, that the decree is right upon the merits, and we find no error of law which seems to us to demand its reversal. It is affirmed.

Brackensieck v. Vahle et al.

1. *Forcible Entry and Detainer—Preliminary Steps.*—In an action of forcible entry and detainer, brought under the sixth clause of Section 2, Chapter 57, R. S., which provides that when lands have been sold under the judgment of any court and the party to such judgment or decree refuses, after the expiration of the time of redemption and after demand in writing, to surrender possession to the person entitled thereto, such person may recover the possession by an action of forcible entry and detainer. The person entitled to such suit is not required before commencing his suit to serve upon the person in possession a copy of the decree and produce and exhibit his deed, as in proceedings to procure a writ of assistance. In such cases the person entitled to possession is required only to comply with the statute—that is, to make a demand in writing before commencing his suit.

2. *Concurrent Remedies—Writ of Assistance, etc.*—A person entitled to the possession of lands sold under a judgment or decree, having obtained his deed, is entitled to have two concurrent remedies, (1) a writ of assistance issuing from the court rendering the judgment or decree, and (2) an action of forcible entry and detainer under the statute.

Memorandum.—Action of forcible entry and detainer. Appeal from a judgment for the defendants rendered by the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

The opinion of the court states the case.

APPELLANT'S BRIEF.

The title acquired at a sale under a mortgage relates back to the execution of the mortgage; and that the purchaser takes the title as it existed in the mortgagor at the time of

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such execution, divested of sales, liens or leases subsequently made by the mortgagor or those claiming under them, and that tenants under subsequent leases may be treated as trespassers by the mortgagee or purchaser and ejected without notice, has been repeatedly held. *Bartlett v. Hitchcock*, 10 Brad. 87, and cases there cited.

It is a rule of construction which applies to judgments and decrees of courts, that when they admit of two interpretations that one will be adopted which is consonant with the judgment which should have been rendered on the facts and law of the case. *Black on Judgments*, Sec. 3 and Sec. 123; *Peniston v. Sommers*, 15 La. Ann. 679; *Wittick v. Tramm*, 25 Ala. 317.

. CARTER, GOVERT & PAPE, attorneys for appellant.

L. H. BERGER, attorney for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was an action of forcible detainer, brought by the appellant, under the sixth clause of Section 2, of Chap. 57, Revised Statutes, entitled "Forcible Entry and Detainer," which provides that, when lands have been sold under the judgment or decree of any court in this State, and the party to such judgment or decree refuses, after the expiration of the time of redemption, and after demand in writing, to surrender possession to the person entitled, that such person entitled may recover possession by an action of forcible entry and detainer. The appellant received a deed for the premises herein involved, made by the master in chancery of the Adams Circuit Court, by virtue of a sale under a decree of foreclosure, to which the appellees herein were parties defendant. The appellees refused to surrender the premises to him, though he served upon them a demand, in writing, for the possession, as required by the statute. The decree upon which the deed was based, provided that, in case of a sale of the premises and execution of a master's deed to the purchaser, that "the grantee in such deed

should have possession of the premises conveyed, and that the parties to the cause who should have possession of the premises, or any person coming into possession under them since the commencement of the suit, should deliver and surrender possession of such premises to the grantee in the master's deed, upon the production of such deed of conveyance."

In order to obtain a writ of assistance from the court rendering the decree, it is contended that the grantee in the master's deed would be required, before applying for such writ, to serve upon the party in possession a copy of the decree and to produce and exhibit the deed from the master, and it is insisted that like steps must be taken before an action of forcible detainer to recover the possession can be instituted. The court below entertained this view of the law and so ruled the result, being a determination of the action against the appellant. We think the appellant had two concurrent remedies, by either or both of which he might proceed to secure possession of the premises.

One remedy was by a writ of assistance to be obtained from the court rendering the decree, and, of course, upon compliance with its requirements; the other, by the action of forcible detainer under the statute. To obtain the benefit of the statutory remedy, he was only required to comply with the statute; that is, make written demand before instituting the action. Though, to succeed upon the trial of the cause in forcible detainer, he might find it necessary to produce his deed in evidence, yet the statute does not require such production as a condition precedent to the institution of the suit, nor was he required to so produce it in advance, because it might have been necessary, under the decree, to have done so before a writ of assistance issuing out of chancery could have been awarded him.

The appellant complied with the requirements of the statute, and it was error to require more for him than the statute required.

For this reason the judgment must be reversed and the cause remanded.

Hughey v. Hughey.

Hughey v. Hughey.

1. *Questions of Fact in Chancery.*—In chancery cases where the evidence is conflicting and witnesses have been examined orally in court, there is the same necessity existing as when there has been a trial by jury, that the error in the finding of the facts shall be clear and palpable to authorize a reversal, because the trial judge has the witnesses before him and can observe their manner and appearances, and is thus afforded facilities often of the greatest importance in determining their credibility.

Memorandum.—Bill for separate maintenance. Appeal from a decree rendered by the Circuit Court of Sangamon County; the Hon. JAMES M. CREIGHTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

Bill in chancery, for separate maintenance, by Annie Hughey, complainant, against her husband, James Hughey, charging the defendant with cruelty, profane and abusive language toward her, failure to provide proper support and maintenance and requiring complainant to work beyond her strength. The defendant, in his answer, denied all of these charges and avers the complainant abandoned her home without just cause.

APPELLANT'S BRIEF.

The policy of the law is to maintain the marriage relation after it is entered upon and not to allow separate maintenance for trivial causes. *Tureman v. Tureman*, 4 Ill. App. 335; *Schraeder v. Schraeder*, 26 Ill. App. 524; *Cooper v. Cooper*, 4 Ill. App. 285.

A wife seeking separate maintenance must be held to a reasonable compliance with the rule requiring every complainant to make out his or her case by a preponderance of the proof. *Houts v. Houts*, 17 Ill. App. 440; *Johnson v. Johnson*, 125 Ill. 513.

SCHOLES & GRAHAM, attorneys for appellant.

APPELLEE'S BRIEF.

To authorize a decree for separate maintenance of the wife, other than for causes for which divorce will be granted, it must be shown that there is reasonable danger of personal violence to her, or a persistent, unjustifiable course of conduct on the part of the husband, which would necessarily render her miserable if she continued to remain with her husband. *Wahle v. Wahle*, 71 Ill. 516.

PATTON & HAMILTON, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was a bill for separate maintenance. The issues of fact were heard by the chancellor, a jury being waived and were found for complainant. A decree was entered accordingly from which an appeal is prosecuted to this court. The only question arising upon the record is whether there is enough in the proof to sustain the decree.

If the testimony of the complainant, supported as it was by that of other witnesses more or less in corroboration of her statements, is to be believed, the decree is right.

On the other hand, if the testimony of the defendant and his sister is to be believed, the issue should have been found for the defendant. "In chancery cases where the evidence is conflicting and witnesses have been examined orally in court, there is the same necessity existing as when there has been a trial by jury, that the error in the finding of fact shall be clear and palpable to authorize a reversal." *Coari v. Oleson*, 91 Ill. 277; *Johnson v. Johnson*, 125 Ill. 510. This for the manifest reason that the chancellor had the witnesses before him and could observe their manner and appearance and was thus afforded facilities often of the greatest importance in determining their credibility.

According to the complainant's testimony, which has considerable corroboration in the testimony of the other witnesses, she was justified in leaving the home of her husband, by whom she was treated with the utmost unkindness, and compelled to perform work about the farm, for which she was

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wholly unfitted. The case made by her testimony shows a persistent course of wrongful treatment which necessarily rendered her life miserable if not wholly unendurable. The fact is apparent that there was too great disparity in the ages of the parties and there is strong reason to suppose that the influence of the husband's sister, who lived with him before and after the marriage, had much to do in causing the unhappiness which even his testimony clearly discloses. There can be little doubt that the complainant was not permitted to enjoy her rightful position in her own household, and that she was treated as a servant rather than as a wife.

We are impressed with the view that the decree is responsive to the real merits of the case, but whether so or not there is no such want of support in the evidence as to warrant our interference. The decree will be affirmed.

Niccolls v. Peninsular Stove Company.

1. *Mortgage—Power to Appoint a Receiver on Default.*—Where a mortgage provides for the payment of taxes and insurance of the buildings upon the premises, and, in case of a default, for the appointment of a receiver to collect rents, etc., during the pendency of foreclosure proceedings, *it is held* that a non-compliance with these provisions empowered the mortgagees to declare the indebtedness due, though not due by the tenor of the notes to secure the payment of which the mortgage was given, and to procure, through the medium of a receiver, to be appointed by the court, possession of the premises, and the application of the rents to the payment of such indebtedness. The courts of this State are vested with ample power and jurisdiction to enforce such contracts.

2. *Mortgagee's Right to Rents.*—The right of a mortgagee to rents secured by a mortgage can not be contracted away by the mortgagor.

3. *Practice—Exceptions to a Master's Report.*—A party dissatisfied with the master's report, must present exceptions thereto and obtain a ruling of the court below upon the same, from which an appeal will lie. Such exceptions can not be preferred for the first time in the Appellate Court.

Memorandum.—Suit in chancery to foreclose a mortgage. Decree for complainant. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed in part and reversed in part. Opinion filed October 17, 1892.

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APPELLANT'S BRIEF.

After conditions broken, the mortgagee may enter and render his security productive by the perception of the rents and profits. *Morse v. Titman*, 44 Ill. 370.

It is assumed by all the authorities that if the rents are pledged by the mortgage, then there can be no question of the right of the mortgagee to the rents, after condition broken. Even the payment of rents in advance is not binding upon the mortgagee. 1 *Jones on Mortgages*, Sec. 773.

KERRICK, LUCAS & SPENCER, solicitors for appellant.

APPELLEE'S BRIEF.

The mortgagor was entitled to the rents until after foreclosure proceedings; it appeared that the mortgaged premises were inadequate. *Haas v. Chicago Building Soc.*, 89 Ill. 498; *Moore v. Titman*, 44 Ill. 367; *Silverman v. N. W. Mut. Ins. Co.*, 5 Ill. App. 124.

The court will not permit a receiver to collect rents which have passed into the possession of a third person before a cause of foreclosure and appointment of a receiver accrued. *M., V. & W. Ry. Co. v. U. S. Ex. Co.*, 81 Ill. 534; *Teal v. Walker*, 111 U. S. 242 (248).

The mortgagee has no right to affect the rights of the mortgagor in possession by filing a bill for foreclosure before a substantial default in the terms of the mortgage had occurred. *Knox v. Oswald*, 21 Ill. App. 105; *First Nat'l Bank v. Gage*, 79 Ill. 207; *Noble v. Greer*, 28 *Pacific Rep.* 1004.

CALVIN RAYBURN, solicitor for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

Cinderella Gardner and her husband executed a mortgage to the appellant to secure an unpaid balance of the purchase money of the mortgaged premises.

It was expressly provided by a clause in the mortgage that the mortgagors should pay the taxes each year upon

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the premises, and should keep the buildings thereon insured for the benefit of the appellant; that a failure in either of these respects should authorize the appellant to declare the entire indebtedness secured by the mortgage to be due and to at once institute foreclosure proceedings. By a further clause of the mortgage it was provided that in case the appellant should begin proceedings for the foreclosure of the mortgage, that upon his application the court should appoint a receiver to collect the rents and profits of the premises and apply the same to the payment of the indebtedness to the appellant, and the mortgagors bound themselves by the same clause to surrender immediate and peaceable possession to any receiver so appointed.

The mortgagor, Gardner, was indebted to the appellee, and after the execution of the mortgage, and after it had been duly recorded, she, the appellee acting with her, leased the land to one Kontz for the term of one year, the tenant being required by the terms of the lease to pay rent to the appellee upon such antecedent indebtedness. For the use of a part of the premises, Kontz agreed to pay \$180 cash rent, for which he executed a note to Rayburn, as attorney for the appellee, and for the use of the remainder of the premises Kontz agreed to pay the appellee, as rent, one third of all crops grown thereon.

The appellant, upon the ground that the mortgagor had failed to pay the taxes or to insure the buildings, as required, declared the debt secured by the mortgage to be due, though not due by the terms of the notes, and filed this bill in equity, asking for the foreclosure of the mortgage and for the appointment of a receiver, etc.

The necessary parties, including the appellee and the tenant, whose note the appellee held, were made defendants to the bill; answers and replications were filed, an order entered enjoining the appellee and Rayburn, its attorney, from transferring the note, and the cause referred to the master for proof and for his conclusion thereon. The report and findings of the master sustained the action of the appellant in declaring the debt due, and upheld his rights to maintain

the foreclosure proceedings, but recommended that the tenant and receiver pay to the appellee the amount of the note given for the part of the rent of the premises.

The appellant filed exceptions to the master's report, so far as it related to the disposition of the rent, but the court overruled the exceptions, sustained the report and entered a decree accordingly. The appellant excepted to the order of the court concerning the right of the appellee to the rent, and brings that question before us by this appeal.

The appellee did not except or in any way object to the master's report or to any of the findings of the master. In this court the appellee applied for and obtained leave to present cross-errors and thereby seeks to question the findings of the master as to the failure of the mortgagor to pay taxes and to keep the buildings insured, upon which the foreclosure proceedings rested.

We do not think this contention open for our examination.

The appellee might, and had it been dissatisfied with the conclusions of the master should, have presented exception to the report and obtained a ruling of the court thereupon, from which an appeal would lie; but exceptions to the report of the master can not be preferred for the first time in an appellate court. We think the appellee concluded by the approval, without objections upon its part, of the report of the master. It can not be allowed now to question the correctness of the finding of the master upon the evidence. *Lowell v. Rock River Co.*, 101 Ill. 57.

By the force and effect of the agreements and conditions contained in the mortgage the right of mortgagors to the possession of the premises and to the enjoyment of the rent thereupon during the pendency of foreclosure proceedings and during the period allowed by the statute in which to make redemption was dependent upon compliance with the terms and provisions of the mortgage.

Non-compliance empowered the mortgagees to declare the indebtedness due, though not due by the tenor of the notes, and to procure through the medium of a receiver to be ap-

pointed by the court, the possession of the premises, and the application of the rents to the payment of such indebtedness. We know of no reason why such agreements may not be entered into, and think the courts vested with ample power and jurisdiction to enforce them. Jones on Mortgages, Vol. 1, Sec. 773, 774, 775; Vol. 2, Sec. 1536; High on Receivers, Sec. 642, 643, 644, 688; Beach on Receivers, 532; 8 Amer. & Eng. Ency. of Law, pages 234 and 239, and authorities there cited.

After this mortgage was upon the records and while thus charged by law with notice of its terms and provisions, the appellee contracted with the mortgagor and his tenant for the application of the rents to the payment of an amount due it from the mortgagor.

The contract under such circumstances could only operate to transfer to the appellee such rights to possession and to the enjoyment of the rents as the mortgagor had, subject to be defeated as to it by anything that, under the mortgage, would defeat the right of the mortgagor. The appellee parted with nothing in the execution of the contract but sought only to secure and collect an existing debt. We are unable to perceive that it obtained any right or equity as against the mortgagee superior to that the mortgagor might have asserted against the mortgage.

The right of the appellant to the rents in question secured to him by the mortgage and the action of the court in appointing the receiver could not be contracted away by the mortgagor. We think the court erred in awarding any portion of the rents to the appellee.

In our judgment the decree should have declared the right of the appellant to the rents so far as necessary to the payment of his decree, and directed the receiver to so apply the money received as rents, or at least retain such money so received until after the sale of the premises by the master. If the master should, by a sale, realize enough to satisfy the appellant's decree and costs, then the money received for rent should be disposed of according to the contract between the mortgagor, the appellee company and the tenant.

So much of the decree as declares the right of the appellee company to the rents in question, and so orders its payment, must be reversed and remanded for further order in that respect, consistent with the views here expressed. In all other respects the decree is affirmed. Costs to be paid by the Peninsular Stove Co., the appellee. Reversed and remanded in part and affirmed in part.

Schmitt v. Henneberry et al.

1. *Subrogation—Equitable and Legal Rights.*—While it is true that a surety may be subrogated to the rights of a creditor in reference to any collateral security which the creditor may hold, and that he may be subrogated to the creditor in the judgment for the purpose of keeping it alive and enforcing it for his own benefit against his co-defendants, yet this doctrine, being one of mere equity and benevolence, will not be enforced at the expense of legal rights.

Memorandum.—Chancery. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

Louis Schmitt was engaged in keeping a saloon and chop house in Bloomington, and in 1891 became largely indebted to various persons, among whom were Matthew Henneberry and Harlan Bros., the appellees herein. The business and all the personal property connected therewith, were the property of Louis Schmitt. The building in which the business was carried on, was the property and homestead of Bertha Schmitt, his wife, the appellant. At the request of her husband, she became his surety for a number of his debts, the aggregate amount being several thousand dollars, for all of which she and Louis gave judgment notes. She was not security for the debt owing to either of the appellees. Judgments by confession were taken by the creditors, all of

whom held judgment notes signed by him, and some of which were also signed by his wife. On each of these judgments an execution was issued, placed in the hands of the sheriff and by him levied on all the property of Louis, and those that were also against appellant, were also levied on her property; and all the property of both appellant and her husband sold.

After the sale of the property, but before any of the proceeds were paid over by the sheriff, appellant filed her bill in chancery, in which she set up the foregoing facts, making the sheriff, and all judgment creditors of Louis and herself, parties defendant, and prayed for a decree, requiring, either, 1st, that the sheriff, out of the proceeds of the property of Louis Schmitt, pay the executions in the order in which they came to his hands, until all such proceeds were exhausted, before resorting to the proceeds of the property of appellant; or, 2d, if for any reason that could not be done, then in case the proceeds of the property of appellant should be used to pay any judgment for which she was surety, on such payment being made, that she might be subrogated to all the rights of the judgment creditors in each of such executions, and in such case such judgments in the order of their priority should be paid out of the proceeds of the property of her husband.

To the bill Henneberry and Harlan Bros. interposed a demurrer which the court sustained and dismissed the bill.

APPELLANT'S BRIEF.

A surety, upon paying the debt of his principal, has a clear right to be substituted in place of the creditor as to all securities held by the latter, and to have the same benefit he would have therein. *Dumpling v. Gorman*, 29 Ill. App. 135; *Wise v. Shepherd*, 13 Ill. 46; *Burgett v. Paxton*, 90 Ill. 288; *Lochenmyer v. Fogarty*, 112 Ill. 578; *Rice v. Rice*, 108 Ill. 204; *Hanford v. Prouty*, 133 Ill. 340; *Bressler v. Martin*, 133 Ill. 288; 1 Story's Eq. Jur., Secs. 327, 499, 502; *Bispham's Eq.*, Sec. 336.

The right of subrogation always, or at least nearly

always, interferes with, subordinates or postpones the rights of some third person; that is, prevents a lien that is a second lien from becoming a first one; the first lien being kept alive for the benefit of the surety. *City National Bank v. Dudgeon*, 65 Ill. 11; *Richeson v. Crawford*, 94 Ill. 165; *Drew v. Lockett*, 32 Beav. 499; *Haven v. Willis*, 100 N. Y. 482; *Powell v. Allen*, 11 Ill. App. 134; *Wise v. Shepherd*, 13 Ill. 41; *Billings v. Sprague*, 49 Ill. 509.

KERRICK, LUCAS & SPENCER, solicitors for appellant.

APPELLEES' BRIEF.

"The true rule would seem to be that a surety, by payment, does not become *ipso facto* subrogated to the rights of the creditor." He has merely an equitable right, which a court of equity will not enforce at the expense of another's legal right, especially where that other (also a creditor of the principal) has an equal equitable right with the surety. "The doctrine of substitution, being one of mere equity and benevolence, will not be enforced at the expense of a legal right." *Junker v. Rush*, 26 N. E. Rep. (Ill.) 500; *Simpson v. McPhail*, 17 Ill. App. 501; *Powell v. Allen*, 11 Ill. App. 134.

BENJAMIN & MORRISSEY, counsel for appellees.

OPINION OF THE COURT.

This was a bill in chancery, filed by the appellant, alleging, in substance, that on the 29th of July, 1891, the National State Bank, of Bloomington, obtained two judgments in the County Court of McLean County for \$550 each against one Louis Schmitt, and his wife, the appellant; that on July 31, 1891, six other judgments in favor of six other plaintiffs were also obtained against the said Louis and Bertha Schmitt, and that on the same day Henneberry and the Harlan Brothers obtained, respectively, judgments against Louis Schmitt alone, one of said judgments being for \$308.23 and the other for \$153; that the total sum of all these

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ten judgments was \$3,837.08, besides the costs; that executions were issued on each of said judgments on the days the same were severally obtained, to the sheriff of said county; that in all of said judgments against her and the said Louis he was the principal debtor and she the surety, the debt in each instance being that of said Louis Schmitt; that under said judgments and executions in favor of the bank the sheriff levied upon real estate belonging to appellant and upon personalty belonging to said Louis, and that afterward, on the 29th of August, 1891, and succeeding days, he sold the said real estate and personal property, the former for \$2,715, and the latter for \$2,716.95, the total proceeds being \$5,431.95, which was \$1,594.87 in excess of the judgments mentioned; but that in the meantime, to wit, August 1st, 1891, the Blatz Brewing Company also obtained a judgment against said Louis Schmitt and the appellant, in which also the said Louis was the principal debtor, and appellant the surety, for the sum of \$2,062.12.

The bill prayed that the sheriff be directed to apply the proceeds of the sale of the property of Louis Schmitt to the payment of the executions against him in the order in which received by the sheriff, whether such executions were against said Louis alone, or against him and the appellant, until all the proceeds of the property of said Louis were exhausted, before taking any of the proceeds of appellant's property; or, if the court held that could not be done, that it would decree the appellant to be subrogated to the rights of the judgment creditors against the said Louis to the extent that her property was applied to paying such judgment and that the same should, in her favor, be held to have priority of right as against the proceeds of the property of said Louis, in accordance with the order in which the executions came into the hands of the sheriff, etc. A demurrer to the bill was sustained and the bill was dismissed, and the question for our consideration is as to the propriety of such ruling.

The situation was such that Henneberry and Harlan, who had judgments against Louis alone, were prior in point of

time and lien to the brewing company, whose judgment was against both the Schmitts. There was money enough from the sale of all the property to pay all the judgments obtained on the 29th and 31st of July and leave a surplus of \$1,594.87, which lacked about as much of paying the brewing company's judgment as the two judgments of Henneberry and Harlan amounted to. If the prayer of the bill were granted, the personal property would all be exhausted in paying judgments to which the appellant desired to be subrogated, thus excluding Henneberry and Harlan from the only fund to which they had access, and leaving so much more for the benefit of the brewing company.

The relief thus sought was properly denied. The object was to displace the legal rights of Henneberry and Harlan and to deprive them of the equitable right of insisting that those creditors who had judgments against Louis and Bertha should first exhaust the funds which were beyond their reach before resorting to the only fund which they could reach.

While it is true that a surety may be subrogated to the rights of the creditor, in reference to any collateral security which the creditor may hold, and that he may be subrogated to the creditor in the judgment for the purpose of keeping it alive and enforcing it for his own benefit against his co-defendants, yet this doctrine, being one of mere equity and benevolence, will not be enforced at the expense of a legal right. *Junker v. Rush*, 136 Ill. 179.

The surety does not become subrogated *ipso facto* by payment, and will be entitled to the relief only upon equitable terms and under equitable conditions.

When the legal or equitable rights of others would be unfavorably affected or wholly disregarded, subrogation would be denied. *Powell v. Allen*, 11 Brad. 134.

Here the complainant seeks to be subrogated to the rights of the creditor and yet to be exempt from one of the conditions to which the creditor was subject—that is, to be required by a creditor of the principal debtor above to seek satisfaction from the fund which the latter creditor could

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not reach, and by this proceeding to secure precedence over such creditor, who had a valid lien at law by virtue of his judgment. The relief so desired is wholly inequitable. The demurrer was properly sustained and the decree dismissing the bill will be affirmed.

Bear v. Bear.

1. *Matrimonial Rights—Sale of Property in Fraud of.*—A husband owned property on the 26th day of November, when he and his wife separated. The husband had a brother living in Kansas. On the 3d day of December he arrived at the home of the husband and purchased all of his property except “cash in hand and promissory notes” for \$5,000, paying \$1,000, and giving his note for the balance; *held*, that the sale was only colorable and that both parties entered into it with the fraudulent intent and purpose of reserving the property beyond the reach of the wife and of preventing its application under the statute to her use and benefit and that of her child.

Memorandum.—Suit for separate maintenance. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLEE'S STATEMENT OF THE CASE.

Appellee, Emma J. Bear, was married to Sebastian G. Bear on the 23d day of February, 1887. There were born of their marriage two children, a daughter (three years old) and a boy (fourteen months old). They lived on a farm. The husband was a prosperous man, and was worth about \$12,000 in various kinds of property. About the 25th day of June, appellee and her husband went to Aurora, to attend the funeral of a relative, and on that occasion, and without any cause whatever, he seems to have conceived an unfounded suspicion against his wife, and from that time on made her the object of the most intense and jealous persecutions. These persecutions and cruelties, practiced by her husband during a period of over five months, re-

sulted in her leaving him, on the 26th day of November, 1891, and going to live with her father. At the time she went away, which was with the husband's consent and approval, he gave her \$200 in money, retaining possession of all the household effects, and of their daughter. On the 14th day of January, 1892, she filed her bill for separate maintenance, setting forth that she was living separate and apart from her husband without her fault, and asking for an allowance for her support. In February, it was discovered that the defendant, the husband, had converted a large portion of his property, about one-half, into money, had taken their little girl and left the country, since which time his place of abode has not been known to appellee. About \$5,000 worth of property which belonged to him, consisting of notes, accounts, credits, horses, cattle, farming utensils and household effects, were all in the possession of, and claimed to be owned by a brother of his, one Joseph Bear. Whereupon a petition was filed by appellee wherein she stated that the said Joseph was selling her husband's property, and asked for an injunction against him, and for the appointment of a receiver to take charge of said property, to be held as a security for the protection of her marital rights. A receiver was appointed, and upon demanding the property from the said Joseph, it was then claimed that he had purchased it from his brother, and that he was the owner of it. Thereupon the complainant filed an amended bill, setting up the facts then in her knowledge.

Joseph Bear, who was not a party to the original bill, came in and answered the amended bill, and submitted himself to the jurisdiction of the court. The cause was referred to the master to take proofs. The master reported from the evidence that Sebastian G. Bear was, on the 26th day of November, 1891, the owner of \$12,000 worth of property; that the complainant had no property or means of support; that Joseph Bear was in possession of \$5,615 worth of property of the said Sebastian G. Bear, which he claimed by virtue of the bill of sale; that he claimed to have paid \$1,000 in cash and to have given his note for \$4,000; that

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the said sale was colorable only, and not made in good faith, and was void as against the rights of the complainant, Emma J. Bear; that \$400 worth of said property was exempt from sale under the exemption laws of Illinois, as against the rights of Emma J. Bear; that the reasonable value of her solicitors' fees was \$300. Exceptions were filed to said report and overruled, except as to the finding of the master as to the \$400 exemption. The other findings of the master were sustained by the decree.

APPELLANT'S BRIEF.

Fraud can not be presumed, but must be proved by the party who alleges it. *Reed v. Noxon*, 48 Ill. 323; *Stout v. Olive*, 40 Ill. 245.

KERRICK, LUCAS & SPENCER, solicitors for appellant.

JOHN T. LILLARD and JAMES S. EWING, solicitors for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

At the February term, 1892, of the Circuit Court of McLean County, upon a bill framed under the statute for that purpose, the appellee obtained a decree for separate maintenance against Sebastian Bear, her husband.

Under the same bill by appropriate pleading an issue was made between the appellee and Joseph Bear, the appellant, who is a brother of Sebastian, as to the ownership of certain personal property, chose in action, etc., claimed by Joseph, but which the appellee alleged was the property of her husband.

This issue was tried and determined in favor of the wife, to reverse which Joseph Bear appeals to this court. The ownership of this property is the only question to be determined.

That Sebastian owned the property on the 26th day of November, 1891, when he and his wife separated, is conceded by all. Joseph's claim is that he purchased the prop-

erty from Sebastian on the 3d day of December, 1891. When the separation of the husband and wife occurred, Joseph lived in Kansas. He arrived at the home of Sebastian, in Illinois, about the 1st of December, only three or four days after the separation, and he alleges that he purchased the property involved herein from his brother a day or two after his arrival.

He produced a bill of sale purporting to invest him with the title to Sebastian's property of "every kind and nature except cash in hand and promissory notes not assigned and delivered to him," all of which he claims to have purchased for a gross sum.

The price fixed upon the property was \$5,000, which Joseph testifies he paid by cash, \$1,000, and by giving his note for \$4,000, bearing seven per cent interest.

It is not complained that the court entertained erroneous views as to any principle of law or equity involved in the decision of the case, or that improper evidence was admitted or competent evidence rejected. The sole ground upon which a reversal is asked is that the evidence does not uphold the decree.

We have carefully read the evidence and attentively followed and considered the argument of counsel thereupon and find no reason for interfering with the finding or decree of the Circuit Court. We are, in fact, fully satisfied from the evidence that the transaction between the brothers by which the appellant insists he became the owner of the property was only a colorable and not a real sale, and that both of the parties entered into it with the fraudulent intent and purpose of removing the property beyond the reach of the wife of Sebastian and of preventing its application under the statute to the use and benefit of his wife and child.

The decree is right and must be affirmed.

Finnell v. Walker.

1. *Pleading—Innuendoes.*—In an action for slander, it is a rule of pleading that while an innuendo may explain, it can not enlarge the meaning of the words alleged.

2. *Innuendoes—Improper Use, etc.*—Where a defendant wishes to test the sufficiency of a declaration in respect to the proper use of innuendoes, his proper course is to demur. If the declaration wholly fails to state a cause of action, the point may be made in arrest or on error, but where there is merely a defective statement of a cause of action, the omission will be aided by the verdict.

3. *Instructions—Measure of Proof.*—An instruction which, as presented to the court, contains an admission that proof of any set of words alleged will be sufficient, is not rendered vicious by the court's adding "*or some one set of words.*"

Memorandum.—Action for slander. Appeal by the defendant from a judgment of \$300, rendered by the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

This was an action for slander. Both parties are residents of the village of Gridley in McLean County. Appellant is a grain dealer and appellee a drayman and policeman of the village. On the 10th of March, 1890, about 4 o'clock P. M., appellant and Chauncey Tarman, Fred. Reese and P. A. Klopensteen were in his office. Some one had just inquired for appellee, when appellant looked out of the window and saw him driving down across the common toward appellant's cribs.

When appellant saw appellee, he said: "There he goes now; I will bet he is going over to get corn." After some words by others, appellant said: "Don't that beat hell for a man to go and take corn like that? There is Joe; I always trusted him. What would you do in a case like that?"

APPELLANT'S BRIEF.

It is not actionable to charge a man with an intent to

commit a crime. Townshend on S. & L., Sec. 161, p. 230; McKee v. Ingalls, 4 Scam. (Ill.) 30.

In every case the defendant, in mitigation of damages, may give evidence to show that he acted in good faith and with honest purpose, and not maliciously. Newell on Defamation, S. & L., p. 901, Sec. 78; Odger on S. & L., 317; Townshend on S. & L., Sec. 409 (3d Ed.); Owens v. McKean, 14 Ill. 460.

Where a party's intentions are material, he may always testify to what his intentions were. Wharton on Evidence, Sec. 482 (2d Ed.).

KERRICK, LUCAS & SPENCER, attorneys for appellant.

APPELLEE'S BRIEF.

This case does not fall within the rule laid down in the case of McKee v. Ingalls, 4 Scam. 30. Saying that a man "will steal" is a very different thing from saying that "he is going (on his way) to steal." One expresses an opinion; the other asserts a fact. See Am. and Eng. Encyclopædia of Law, Vol. 13, page 353. One imputes a criminal intent; the other charges that steps are being taken to carry out a criminal intent. See Seaton v. Codray, Wright (Ohio), 101; Wilson v. Tatum, 8 Jones (N. C. L.) 300.

JOHN E. POLLOCK, JAS. S. EWING and JOHN F. WIGHT, appellee's attorneys.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

The appellee recovered a judgment against the appellant for \$300, in an action on the case for slander.

The words alleged charged the plaintiff with the crime of larceny. The defendant pleaded the general issue and justification.

An effort was made to prove that the plaintiff had stolen the defendant's corn and it is now insisted in the printed arguments that the evidence sustained the plea of justification.

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It is urged as a ground of reversal that some of the sets of words alleged in the declaration did not amount to a charge of larceny, but that the court, by an amendment to the second instruction asked by defendant, advised the jury that the plaintiff might recover on proof of any set of words alleged.

It will be noticed that the innuendo in each instance is, that by the words set forth, the defendant intended to charge the plaintiff with the crime of larceny.

It is a rule of pleading that while the innuendo may explain, it can not enlarge the meaning of the words alleged.

If the defendant wished to test the sufficiency of the declaration in this respect, the proper course was to demur, and where a declaration wholly fails to state a cause of action the point may be made by motion in arrest or on error, though where there is merely a defective statement of a good cause of action, the omission will be aided by the verdict.

The instruction as modified read thus:

“2. The court instructs the jury for the defendant, that before the plaintiff is entitled to recover any verdict in this case, he must prove by a preponderance of the evidence that the defendant uttered and spoke of and concerning the plaintiff some one or more of the sets of alleged slanderous words mentioned in the declaration, and that such words were spoken by the defendant, in the presence and hearing of some person or persons other than the plaintiff. By “sets of words,” is meant the groups of words as they are embraced within the quotation marks in the declaration. The court further instructs the jury that proof of equivalent words will not be sufficient, but they must prove the words alleged in the declaration as alleged in the declaration, *or some one set of words.*”

The modification consisted of adding the words in italics at the end. The instruction as presented contained in the first clause an admission that proof of any set of words alleged would be sufficient, and the court by adding the

same or an equivalent phrase did no more than to make the instruction consistent. By referring also to the second instruction which was given as asked by the defendant the same concession will be found.

Having thus admitted the sufficiency of the declaration the defendant should not be heard to question it now in this irregular way. We are not therefore required to determine whether the declaration was faulty or not. With regard to the merits as disclosed by the evidence we are of opinion that the conclusion reached by the jury is not erroneous. Apparently the contest was not so much upon the issue whether the plaintiff was charged with larceny as whether he was guilty. Substantially it was confessed that the defendant imputed and intended to impute that crime to the plaintiff and a vigorous effort was made to justify.

The jury having settled the questions of fact upon evidence which is sufficient there is no occasion to disturb the verdict.

No errors of law of any considerable importance are perceived and the judgment will be affirmed.

Rindskoph et al. v. Kuder et al.

1. *Propositions of Law—Effect of a Failure to Present.*—When in a chancery proceeding no propositions to be held as law in the decision of the case were presented to the court below or exception taken to any ruling of the court as to the reception or rejection of evidence, the sole question for this court on appeal is, is the decree supported by the evidence.

2. *Party Calling His Adversary as a Witness, Not Concluded by His Testimony.*—Where, in a proceeding by a creditor's bill, the complainants called the defendants and put them upon the stand as their witnesses, the complainants are not concluded by their testimony, nor is the court bound to accept it as absolutely true.

3. *Credibility of Witnesses.*—The trial court has means and opportunities for judging as to the credibility of witnesses, and as to the weight that ought to be given to their testimony, far superior to that

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of the Appellate Court, and if the trial court did not discredit their testimony there is no reason why the Appellate Court should do so.

Memorandum.—Creditor's bill. Appeal from a decree of the Circuit Court of Champaign County dismissing the bill; the Hon. FERDINAND BOOKWALTER, Circuit Judge, presiding. Heard in this court at the May term A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANTS' BRIEF.

A party may not discredit his own witness by direct impeaching testimony, but we are aware of no rule whereby one is bound by any testimony any witness may give. The statement by a witness that a transaction was upon good consideration and all in good faith, is but a conclusion, and what he may deem honest and fair the law may pronounce fraudulent as against creditors. *Mitchell v. Sawyer*, 115 Ill. 657.

Appellants are not bound by the testimony of appellees, *i. e.*, their conclusion that there was fraud. *Mitchell v. Sawyer*, 115 Ill. 657; *Bell v. Devore*, 96 Ill. 217; *Thorne v. Crawford*, 17 Ill. App. 397.

KERRICK, LUCAS & SPENCER, and GERE & PHILBRICK, solicitors for appellants.

APPELLEES' BRIEF.

A party is not permitted to discredit his own witnesses; by calling them to testify in his behalf he vouches for their character and integrity. *Hill v. Ward*, 2 Gilman, 285; *Griffin v. City of Chicago*, 57 Ill. 317.

JOHN J. REA, solicitor for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was a creditor's bill brought by the appellants to set aside as fraudulent a transfer and conveyance of certain property, real and personal, made by Christopher L. Kuder to Susanna Kuder, his mother. Appellants, judgment creditors of Christopher, allege that the conveyance in question

was not *bona fide*, but merely colorable, and that the mother really holds the property in secret trust for the benefit of the son, in fraud of their rights as creditors. The appellees answered, denying all charges of fraud, or that a trust, secret, or otherwise, existed, and averring that Christopher L. was indebted to Susanna, and that the conveyance and transfer in question was made in good faith to discharge such indebtedness.

The decree of the court, upon full hearing, was that the bill be dismissed, from which this appeal is prosecuted.

No propositions to be held as law in the decision of the case were presented to the court, nor was exception taken to any ruling of the court as to the reception or rejection of evidence.

The sole question urged upon this court is, that the decree, under the evidence, should have been for the appellants.

The appellants introduced the appellees as witnesses, and the testimony thus elicited is all that was offered in regard to the sale and transfer of the property or the existence of a trust.

The statements of both are that Christopher L., some years before the transfer and conveyance sought to be vacated, became indebted to his mother in the sum of \$3,000, for money borrowed, upon which he had paid annually the interest at seven per cent; that he became indebted to others beyond his ability to pay, and desired to discharge the debt to his mother; that the mother consented to receive the property in question in settlement of her claim and to pay the son \$1,000 in addition thereto, and that the whole transaction was *bona fide*, and not fraudulent. We do not think that the appellants were concluded by this testimony though it came from witnesses produced by themselves. Nor do we think the court was bound to accept it as absolutely true.

Counsel for appellants in their brief say they understand the court regarded them and the court as absolutely concluded by the testimony of the appellees. If counsel feared

that the court was laboring under a misapprehension as to the law in this respect they should have presented a proposition of and stating the true rule, and asked that it be held or refused by the court.

In the absence of such a proposition our presumption is that the circuit judge entertained correct views as to the law and that he differed from appellants only as to the facts. We have been furnished by the counsel with full and extensive briefs in which all the evidence is reviewed and ably commented upon.

We have made a careful examination of the testimony and considered all that has been said by counsel with reference thereto, and without reciting the evidence or our reasoning thereupon we deem it proper only to say that we find the decree of the Circuit Court amply sustained by the proof.

That Christopher was actually indebted to Susanna, his mother, clearly appears. The conveyance and transfer was for the purpose of discharging this debt in preference to paying debts due to others. That this might lawfully be done is not only indisputable but is not disputed. These conclusions of course rest largely upon the testimony of the appellees, introduced as witnesses by the appellants. Excluding such testimony, the appellants are wholly without proof to support the bill. The Circuit Court had means and opportunities for judging as to the credibility of the appellees as witnesses and as to the weight that ought to be given their testimony far superior to ours, and if it did not discredit their testimony we can imagine no reason why we should do so. The property transferred was an undivided one third interest in the personal and in certain real estate devised to Christopher L. by the will of his deceased father. Its value was variously estimated by the different witnesses produced by the contending parties and was rendered still more uncertain by the fact that it, with the remainder of the estate of the father, was subject to the payment of an indefinite but large indebtedness of the father. For this undivided interest Susanna gave up Christopher's indebtedness of some-

thing more than \$3,000, and gave him her note for \$1,000, conditioned that if any of the land of the estate had to be sold to pay the debts of the deceased that the note should be proportionately reduced. We do not find this amount thus received and to be received by Christopher so disproportionate to the estimated value of the property as to stamp the transaction as fraudulent. Nor do we find any proof whatever of the existence of a trust. The witnesses expressly deny that a trust exists or existed and the facts as detailed do not show to the contrary.

To enter into a recitation of the facts in detail and discussion of the views of counsel, and our view upon the facts, would be fruitless of good to either party, and would unnecessarily incumber the reports of the opinions of this court. The decree appears to us correct and is affirmed.

Lake Erie & Western R. R. Co. v. Quisenberry.

1. *Railroad Company—Right to Charge Ten Cents Extra.*—A rule of a railroad company requiring passengers who fail to purchase tickets to pay ten cents in addition to the regular fare, is one which the company can lawfully enforce.

Memorandum.—Action on the case to recover damages resulting from an ejection from a railroad train at Arrowsmith, a station in McLean County. Appeal from a judgment for six dollars, rendered by the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

Appellant purchased a ticket at Gibson for passage to Saybrook. While *en route* he concluded to come on to Bloomington. When he reached Saybrook he had not sufficient time or opportunity to purchase a ticket from that point to Bloomington. After the train left there, the conductor came to him, he handed him \$1 and told him he

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wanted to go to Bloomington. The conductor took the dollar and offered him back twelve cents, retaining eighty-eight cents, which was the ticket fare and ten cents extra. Appellee refused to receive the twelve cents, informing the conductor that the fare was seventy-eight and not eighty-eight cents, and demanded of the conductor twenty-two cents in change and a ride to Bloomington or the return of his dollar. The conductor refused to do either, but retained his ticket fare to the next station, Arrowsmith, and ten cents extra, and offered him the sum of seventy-three cents change, which he refused and which the conductor delivered to the agent at Arrowsmith. On the arrival of the train at Arrowsmith appellee was ejected and compelled to remain over until the next regular train.

On the trial he recovered \$6. The defendant appealed.

APPELLANT'S BRIEF.

The law gave the railroad company the right to make the charge. C., B. & Q. R. R. Co. v. Parks, 18 Ill. 460; St. L. & T. H. R. R. Co. v. South, 43 Ill. 176; C., R. I. & P. R. R. v. Brisbane, 24 App. 463.

We think the course pursued by the conductor was clearly the only legal course. C., B. & Q. R. R. v. Parks, *supra*.

The conductor had a right to assume that he would still persist in his refusal to pay the legal fare, and unless plaintiff offered to recede from his position, which he did not do, the conductor had a right to require him to leave the train. O'Brien v. B. & W. Ry. Co., 15 Gray (Mass.) 20; C. I. N. R. R. Co. v. Skillum, 39 Ohio State, 444; O'Brien v. N. Y. Cent. R. R., 80 N. Y. 236; Louisville R. R. Co. v. Harris, 9 Lea (Tenn.) 180; Hoffbauer v. D. & N. W. Ry. Co., 52 Iowa, 342; Stone v. C. & N. W. Ry. Co., 47 Iowa, 82.

Where the evidence discloses no wanton, willful or malicious misconduct on the part of the railroad company's employes it is error to instruct the jury that exemplary damages may be allowed. T., P. & W. Ry. v. Patterson, 63 Ill. 306; C., B. & Q. R. R. v. Boger, 1 Ill. App. 472; C. R. I. & P. Ry. Co. v. Brisbane, 24 Ill. App. 463.

The court allowed plaintiff to prove not only his salary at the time of the incident but also allowed him to prove the highest salary he ever received. This was error. *Wabash Railway v. Friedman*, N. E. Rep., Vol. 30, 353.

A. E. DEMANGE, attorney for appellant.

W. E. HACKEDORN, general attorney, and F. S. FOOTE, assistant general attorney, of counsel.

JOHN E. POLLOCK and A. J. BARR, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

The appellee recovered a judgment for six dollars against the appellant upon the following state of facts: He purchased a ticket at Gibson to Saybrook before reaching the latter place, and after the conductor had taken the ticket concluded to go on to Bloomington. The ticket office at Saybrook was open when the train reached there but plaintiff remained on the train and made no effort to procure a ticket from there to Bloomington. It may be assumed that he had not sufficient time for that purpose.

After the train left Saybrook the conductor again came to him whereupon he tendered one dollar saying he wished to go to Bloomington. The ticket fare from Saybrook to Bloomington was seventy-eight cents, but by the rules of the company when the fare was paid on the train the conductor was required to charge ten cents extra.

Accordingly the conductor offered appellee twelve cents in change which he refused to accept and demanded twenty-two cents and a ride to Bloomington or a return of the dollar.

The conductor refused to do either and explained the matter fully including the rule which required him to charge the extra ten cents.

But the appellee persisted in his demand and finally the conductor retained his ticket fare to the next station, Arrow-smith, and ten cents extra, and offered him seventy-three cents in change, which he also refused to receive. Arriving

Bloomington Canning Co. v. Bessee.

at Arrowsmith, he was asked by the conductor whether he would pay his fare on to Bloomington, saying he would charge him but the one extra ten cents, but he said he would not, and that the conductor would have to put him off. He would not get off, nor would he pay his fare.

Thereupon the conductor took him by the arm and led him off the train, leaving the seventy-three cents with the agent, informing appellee of the fact and that he could get it at any time.

We are of opinion that appellee had no cause of action. Having failed, without the fault of the company, to procure a ticket from Saybrook, the conductor had the right to charge the extra ten cents, and might well have retained the fare to Bloomington. In taking car fare, which included the extra charge, to the next station, he violated no right of the passenger, who refused, without reason, to comply with a rule which the company could lawfully enforce. When he refused, at Arrowsmith, to pay the ticket fare to Bloomington he forfeited his right to remain upon the train and was properly ejected. No unnecessary force was used, and whatever indignity he endured was due to his own unjustifiable conduct. The judgment will be reversed and the cause remanded. If, upon another trial, substantially the same facts appear, the court will instruct the jury to find for the defendant.

Bloomington Canning Company v. Bessee.

1. *Express Provision of a Contract—Custom, etc.*—The express provision of a contract can not be radically changed and avoided by a general custom or usage.

2. *The Office of a Custom.*—The true office of a custom, in this respect, is not to change a contract, but to make clear its true meaning when its terms are ambiguous or uncertain, or when words are used which have a trade, or commercial, or peculiar meaning.

Memorandum.—Assumpsit for a breach of contract. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit

Judge, presiding. Heard in this court at the May term, A.D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE

This suit was brought for an alleged breach of the contract, set out in full in the opinion of the court. Plaintiff claimed the value of twenty acres of sweet corn, on the ground that the company failed to notify him to deliver it until it was too ripe; that he offered to deliver it before it was too ripe, but that the company refused to receive it. The company denied that they refused to receive it, and claimed that corn was worth more than the contract price, that it was short of corn and needed it badly, and that the defendant violated his contract by not delivering it in time, and claimed damages as set-off. The jury gave \$200 damages, and refused to allow the set-off.

WILLARD & WILLIAMS, attorneys for appellant.

APPELLEE'S BRIEF.

"A custom can not be set up against the clear intention of the parties." 2 Parsons on Contracts, 546.

"Where the terms of a contract are plain, usage, even under the very contract, can not be permitted to affect materially the construction to be placed upon it." 2 Parsons on Contracts, 547.

"A particular usage or custom is no part of a contract which expressly excludes it, or of which the parties are shown to have no knowledge." L. S. & M. Ry. Co. v. Richards, 126 Ill. 448-456.

"No usage or custom can be set up to contravene the express terms of a contract." Everingham v. Lord, 19 Brad. 565-568.

"Custom or usage is not admissible to add to an express agreement a condition or limitation repugnant to, or inconsistent with the contract, to vary or contradict it expressly or by implication." Gilbert v. McGinnis, 114 Ill. 28.

Bloomington Canning Co. v. Bessee.

“Where the parties have settled the terms of a contract by agreement, they will be concluded by it, regardless of usage or custom.” *Corbett v. Underwood*, 83 Ill. 324.

“A private and special custom can not control the express words of a contract.” *Mulliner v. Bronson*, 14 Brad. 355.

ROWELL, NEVILLE & LINDLEY, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This is an appeal from a judgment in favor of the appellee in the sum of \$200, damages awarded for a breach of the following contract:

“Articles of agreement, made between T. A. Bessee, of the first part, and the Bloomington Canning Company, of the second part. Witnesseth: That said first party agrees to plant for the second party twenty acres, with privilege of forty acres, of sugar corn, on terms and conditions following: The second party agrees to furnish the seed to plant the same. First party agrees to plant the kinds of corn and at the time second party may designate; to cultivate the same thoroughly, to pick said corn and deliver the same in the husk to the second party—the same day said corn is picked—at the factory in Normal, at such times as second party may direct, and in good canning condition, suitable for canning. The second party agrees to pay the first party 40 cents per 100 pounds of ears of husked corn, delivered as aforesaid; said corn to be husked by the party of the second part. It is mutually agreed that in case of unavoidable accident, so said second party can not can corn, then said second party shall have the right to the said corn dry; and in that event, said first party shall have the right to deliver said corn or not at his option.

“In witness whereof, the parties hereunto have set their hands and seals this 5th day of March, 1891.”

(Signed by the parties.)

The true construction of this contract is the material question in this record. As we construe it, the appellee undertook to raise twenty acres of sugar corn for the

appellant company from seed to be furnished by the company, which was to be planted by the appellee at a time designated by the company. The appellee was required to thoroughly cultivate the crop, to pick the corn at such time as the canning company should direct, and deliver it in good condition for canning, the same day it was picked, to the canning factory in Normal.

The obligations of the appellant company under the contract were to furnish the seed, fix the time of planting and direct when the corn should be picked, and receive and pay for the corn. The Circuit Court so construed the contract. The appellant company did not direct the picking of the corn until it was too hard for canning, and then refused to take it.

The appellant company offered to prove that its usual and long established custom in dealing with parties growing corn for it, was to give such parties general information as to the proper condition of ripeness of corn for canning purposes, and leave the time of gathering, in view of such general information, to the judgment of those growing the corn, the company reserving, however, the right to hasten or delay the picking and delivery of the corn, so that the factory might have a regular supply of corn at all times, etc., etc.

The court refused to allow this proof to be made.

Under the contract the fitness of the corn for canning was to be determined by the appellant company before it was picked, and the appellee had only to pick the ears when directed and deliver them the same day they were picked to the appellant in good condition for canning. Under the usage sought to be shown the responsibility of determining when the corn was in proper condition to be picked was cast upon the grower of corn, who must suffer the loss if his judgment be at fault.

The express provision of a contract can not be thus radically changed and avoided by a general custom or usage. *Gilbert v. McGinnis*, 114 Ill. 28.

The true office of a custom in this respect is not to change

a contract, but to make clear its true meaning when its terms are ambiguous or uncertain, or when words are used which have a trade, or commercial, or peculiar meaning. *Gilbert v. McGinnis*, 114 Ill. 28; see *Greenleaf Evid.*, 2d Vol., Sec. 251 and notes; *Parson on Contracts*, Vol. 2, p. 547.

This general usage and custom was properly held not competent evidence. The appellee had raised corn for the appellant company during a prior year, and appellant complains that the court, though holding the usage, acts and conduct of the parties during the former years in the execution under the contracts of such prior years proper to be shown, as a means of interpreting the contract at bar, refused to admit in evidence proof that the contracts for the said year and the contract in question were drawn and executed upon the same printed blank forms. We think this proof ought to have been admitted, as it tended strongly to show that the contracts for the several years were identical in terms and conditions.

The acts and usage of the parties during such prior year was, however, fully shown by both parties wholly upon the assumption that the contracts were the same. The court, at the request of the appellant company, instructed the jury in effect that the contract should be enforced according to the intention and understanding of the contracting parties at the time of its execution, and that in arriving at a conclusion as to what meaning should be given to that phrase in the contract, which required that the corn should be picked at such time as the appellant company might direct, the jury might consider the acts and conduct of the parties during the former year, and that if, from all the evidence, the jury believed that the parties to the contract at bar understood when it was executed that the appellant company was only required and expected to give general directions as to the time when corn should be picked, then the verdict should be for the appellant company.

As both of the parties and the court proceeded upon the assumption that the contracts were the same, and as the court instructed the jury that the contracts of the last

year might be interpreted by the acts and conduct of the parties under the contract of a former year, it is manifest that the proof as to the use of the same form of contract, if admitted, would but have been additional proof of a fact assumed and conceded by all to be true. We can not regard the act of the court in refusing to allow such proof to be made as an error demanding a reversal.

We find no reason for reversing the judgment, which seems to us right upon the merits. Affirmed.

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**Grand Lodge Ancient Order of United Workmen et al.
v. Belcham.**

1. *Life Insurance—Application—Construction of Questions and Answers.*—The application to become a member in a beneficiary insurance association, contained the following: “I certify that the answers made by me to the questions propounded by the medical examiner of this lodge, which are attached to this application and form a part thereof, are true.” Among other questions and answers the application contained the following:

“To what extent does the person use alcoholic stimulants? A. None.”

“To what extent does the person use tobacco? A. Moderate.”

“To what extent does the person use opium? A. None.”

“Are there any inclinations that would lead you to suppose that the applicant leads or has led other than a sober and temperate life? A. None.”

“Do you consider the applicant’s life to be safely insurable and do you recommend that a policy be granted? A. Yes.”

The answers were made by the medical examiner. *It was held* that the answers thus made might be regarded as made by the applicant with this qualification, that he had the right to rely to some extent upon the construction given by the examiner to the various questions, and the answers which the examiner made from the information he obtained by his questions to the applicant.

2. *Habitual Use of Intoxicating Liquor.*—Taking the several questions relative to liquor, tobacco and opium, embraced in the general interrogatory, it must be apparent that a liberal and reasonable construction should be applied. It can not be supposed it was understood that the applicant had never taken liquor or opium and that he was ignorant of the taste of either. Such a construction, literally applied,

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would exclude the great mass of men and would reduce the ranks of insurance organizations to an unprofitable minimum.

3. *The Moderate Use of Tobacco Implies a Fixed Habit.*—Ordinarily the moderate use of tobacco implies a fixed habit. As a rule the system does not readily tolerate and it is only after repeated trials that one can moderately use it. Hence a habit more or less fixed is implied from the statement of moderate use.

4. *Moderate Use of Liquor.*—In regard to liquor it is otherwise, the taste of it is not usually repugnant and one may occasionally indulge in it without having acquired a habit of doing so.

Memorandum.—Action upon a beneficiary certificate insuring the life of appellee's husband. Appeal from a judgment of the McLean County Circuit Court; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANTS' STATEMENT OF THE CASE.

This suit was brought by appellee to recover \$2,000 and interest, being the amount of a beneficiary certificate insuring the life of her husband, Thomas W. Belcham. Appellants defend on three principal grounds, presented by appropriate special pleas.

The first ground is a denial of joint liability made by a sworn plea filed by appellants.

The second ground is, that Thomas W. Belcham was not a member of appellant lodges, but had during his life, on January 31, 1891, been expelled for habitual drunkenness and for being in the lodge room intoxicated. It was replied to this plea that he was insane when expelled. On trial it appeared he had for a long time been habitually drunk, and some witnesses thought his drunkenness had made him insane, while others thought he was simply and only drunk, and not insane.

The third ground is, that, on September 7, 1878, when appellee's husband, Thomas W. Belcham, gained admission to appellant lodges and procured the certificate of insurance sued on, he did so by false, material statements and concealments in a written application for membership and beneficiary insurance, which statements he made part of his insurance certificate; and, being false, fraudulent and mate-

rial, his insurance was thereby, as claimed, rendered null and void, by the constitution and by-laws of appellants and under the law of insurance. The jury gave appellee a verdict, and the court rendered judgment thereon for the full amount \$2,115.

APPELLANTS' BRIEF.

Bouvier defines an habitual drunkard to be "a person given to inebriety or the excessive use of intoxicating drink, who has lost the power or will, by frequent indulgence, to control his appetite for it." In *State v. Pratt*, 34 Vt. 323, it was said: "An habitual drunkard is one who is in the habit of getting drunk, or is commonly, or frequently so." In *Murphy v. People*, 90 Ill. 59, it is held that a person who is in the habit of getting intoxicated is one "who has the involuntary tendency to become intoxicated, which is acquired by frequent repetition."

Webster says, a sober man is "one not intoxicated or excited by spirituous liquor; as, the sot may at times be sober." A most eminent court says a man may be an habitual drunkard and yet be sober for days and weeks together. *Ludwick v. Commonwealth*, 18 Pa. St. 174.

JOHN T. LILLARD, attorney for appellants.

APPELLEE'S BRIEF.

Answers to questions in applications for membership in benefit societies are not warranties, but representations. *Bacon Ben. Soc.*, Sec. 216; *N. W. B. & M. A. Ass'n v. Cain*, 21 Ill. App. 471; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 484; *The I. M. B. Society v. Winthrop*, 85 Ill. 537.

The question, the answer to which is alleged to have been willfully false, was of such a character as to direct his mind to the point as to whether he had formed a habit of drinking and nothing more. Webster defines "Use (*v. t.*) To practice customarily; to accustom; to habituate." In a case where the principal question was, did the insured "use any intoxicating liquors or stimulants?" it was held by the court

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that it did not direct the mind to anything but a customary or habitual use. *Van Valkenburg v. A. P. L. Ins. Co.*, 70 N. Y. 605.

The court should construe the rules and regulations of such societies liberally, to effect the benevolent object of their organization. *Niblack on Ben. Soc.*, 391-2; *Supreme Lodge v. Schmidt*, 98 Ind. 374; *Supreme Lodge v. Abbott*, 82 Ind. 1; *Erdman v. Order, etc.*, 44 Wis. 376.

Forfeiture of membership and the rights incident to it are not favored, and the construction should be such as to avoid the forfeiture, if the language employed will admit of such construction. *Connolly v. Shamrock B. Society*, 43 Mo. App. 283.

Habitual drunkenness, without a trial, and suspension or expulsion for that cause, does not work a forfeiture of beneficiary's rights. As before stated, this case is not like *Royal Templars v. Curd*, 111 Ill. 284. It is like the case of *High Court I. O. O. F. v. Zak* (Ill. Sup. Co.), 26 N. E. Rep. 593.

EDWARD BARRY and JOHN E. POLLOCK, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This suit was brought by appellee against appellants to recover \$2,000 and interest upon a beneficiary certificate insuring the life of her husband, Thomas W. Belcham.

The plaintiff recovered and the defendants bring the record to this court by appeal.

Two questions of fact were raised by the pleadings and contested upon the trial.

1st. Did said Thomas W. Belcham procure the certificate by a false and material statement in his written application for membership in reference to his use of intoxicating liquor?

2d. Was he insane at the time he was expelled from the lodge upon the charge of drunkenness?

These questions were solved in favor of the appellee.

It is unnecessary to set out the details or even the substance of the evidence upon the issues thus presented.

We are of opinion there was enough in the proofs to sustain the conclusion reached and that there is no sufficient reason for interfering with the judgment upon the errors assigned as to this branch of the case.

The only question of law that we care to notice arises upon the construction given by the court to the questions and answers attached to the application referring to applicant's use of intoxicating liquor.

The application contained the following language: "I certify that the answers made by me to the questions propounded by the medical examiner of this lodge which are attached to this application and form a part thereof, are true."

What questions were propounded by the medical examiner does not appear, but his report which is attached to the application contains among others the following questions and answers:

16. To what extent does the person use alcoholic stimulants? A. None. (b) To what extent does the person use tobacco? (b) Moderate. (c) To what extent does the person use opium? (c) None. (d) Are there any indications that would lead you to suppose that the applicant leads or has led other than a sober and temperate life? (d) None.

23. Do you consider the applicant's life to be safely insurable and do you recommend that a policy be granted? A. Yes.

24. Are the above answers made from personal examination and from questions propounded to the applicant? A. Yes.

The answers thus made by the medical examiner may be regarded as made by the applicant with this qualification, that he had the right to rely to some extent upon the construction given by the examiner to the various questions, and the answers which the examiner made from the information he obtained by his questions to the applicant. Among the questions and answers contained in this report are a number relating to the physical condition of the party, *e. g.*, the condition of the pulse, the action of the heart, breathing, expectoration, the indications of disease of the nervous

system, of the lungs, etc., such as are usual in examinations for life insurance. As to all these the examiner may be trusted to form his professional opinion from what he can discover by examination and by such questions as he may deem proper. If the applicant states the facts according to his best knowledge and recollection he will not be prejudiced by the erroneous conclusion reached by the examiner.

Taking the several questions relating to liquor, tobacco and opium embraced under the general interrogatory No. 16 all together, it must be apparent that a liberal and reasonable construction should be applied to them and to the answers thereto.

It can not be supposed it was understood that the applicant had never taken liquor or opium and that he was ignorant of the taste of either. Such a construction literally applied would exclude the great mass of men and would reduce the ranks of any insurance organization to an unprofitable minimum.

The question to what extent one uses liquor is rather loose and indefinite. We think the company, propounding such a question, should not be permitted to give it a close and technical meaning, and that in view of the sub-questions the fair and reasonable construction is to imply something more than an occasional or incidental use. There must be to some extent a habit, or a custom in that regard. So it was held in *Van Valkenburg v. A. P. L. Ins. Co.*, 70 N. Y. 605. Hardly any ordinary person reading those questions and answers would suppose that an occasional, not a customary use was intended either by the questions or the answers.

Counsel for appellant argue that there is great significance in the answer *none* in regard to liquor, and *moderate* in regard to tobacco, and that an implication highly unfavorable to the applicant is to be drawn therefrom.

We think not; ordinarily, the moderate use of tobacco implies a fixed habit. As a rule, the system does not readily tolerate it, and it is only after repeated trials that one can moderately use it. Hence, a habit more or less fixed is im-

plied from the statement of moderate use. Not so in regard to liquor. The taste of it is usually not repugnant, and one may occasionally indulge in it without having acquired a habit of doing so.

The Circuit Court, in its rulings upon the admission of evidence and in giving and refusing instructions, evidently entertained the views above expressed as to the true construction of the application in this respect.

We are of opinion that no substantial error has intervened and that, therefore, the judgment should be affirmed.

Best v. Wilson.

1. *Instructions Given Orally.*—While the statute requires the court to instruct the jury in writing, it is competent for the parties to waive this requirement, and doing so, they are bound by their agreement to that effect.

Memorandum.—Action of assumpsit. Appeal from a judgment rendered by the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S BRIEF.

On the question of instructing orally, we cite Starr & Curtis' Rev. Stat., 1814, Sec. 53: "Hereafter no judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing."

JAMES B. ATCHISON, attorney for appellant.

WILEY & NEAL, attorneys for appellee.

OPINION BY THE COURT.

The plaintiff brought an action against the defendant before a justice of the peace to recover damages for failing and refusing to receive a lot of hogs as required by the

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terms of a contract entered into by the parties. The case was removed by appeal to the Circuit Court where, upon a jury trial, the plaintiff obtained a verdict for \$96. A motion for a new trial was made and the plaintiff remitted \$21 of the verdict. Whereupon the court denied the motion for a new trial and rendered judgment in favor of the plaintiff from which the defendant appealed to this court. We find on examining the record that upon the question of fact as to whether the defendant violated the contract the evidence, though conflicting, is sufficient to support the verdict.

The court properly advised the jury by its instructions as to the law of the case. It is objected, however, that the instructions were given orally and error is assigned thereon, but on turning to the record we find that this was done by agreement of counsel. Having so agreed the objection can not be considered.

While the statute requires the court to instruct in writing it is competent for parties to waive the requirement and they must be bound by their agreement to that effect. We find no error and the judgment will be affirmed.

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1. *Drainage Rights and Burdens.*—In respect to the rights and burdens of drainage, individuals hold their ownership in land in accordance with the natural conformation of the ground. The right of the owner of the dominant heritage to drainage is based wholly on the principle that nature has ordained such drainage. He may cast upon the servient heritage such water as naturally there descends, and may in the exercise of good husbandry collect such water by ditches and discharge it with increased flow and in greater quantities upon the lower lands than would in the course of nature occur, provided it be discharged into a natural channel or watercourse.

2. *Drainage—Burdens of the Servient Proprietor.*—This burden the owner of the lower land must accept, but he is not to be burdened with or damaged by the discharge of water upon his premises the flow of which has been by the owner of the upper land directed from its natural course by ditches and thus brought to his land, when in the course of

nature such water, but for the artificial ditches or drains, would have flowed in another direction.

3. *Right of Action—Future Damages.*—Whether a right of action for damages occasioned by the overflow of water in a ditch arises upon the construction of the ditch within the meaning of the statute of limitations depends upon whether the ditch is to be regarded as a permanent structure. If permanent, the owner may upon its construction institute a suit for and recover not only present but future damages, and such recovery will operate as a bar to all future actions by such owner or by any one holding under or through him.

4. *Ditches, When Permanent Structures—Statute of Limitations.*—When a ditch by construction or by act of the parties becomes a permanent structure, a failure to bring an action for damages occasioned by it within the statutory period, operates as a bar to a recovery by the owner or his grantees.

5. *Ditches, When Permanent Structures in a Legal Sense.*—The question as to when a ditch is a permanent structure in a legal sense is not to be determined from a consideration alone of its enduring character, or that, if not changed by the hand of man, it would be likely to continue forever. To be permanent in a legal sense a structure must, in addition to being permanent or enduring within itself, be such that its continuation is lawful, because if not lawful it is subject to be removed or abated by a legal proceeding, and therefore can not be deemed permanent.

6. *Nuisance, When a Permanent Source of Injury.*—A nuisance which may be abated by law is not regarded as a permanent source of injury, but as a continuing source, and successive actions for damages occasioned by it may be maintained from time to time as such damages are inflicted.

7. Supreme Court Decisions, *Randall v. Cooper*, 59 Ill. 817, explained, etc.

Memorandum.—Action to recover damages for a nuisance. Appeal from a judgment rendered by the Circuit Court of Sangamon County; the HON. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

The opinion of the court states the case.

APPELLANTS' BRIEF.

Appellee had no legal right to change the course of the surface water from 280 acres, or any part of this land, and throw it upon the lands of appellants, while in a state of nature it ran in other directions, and is liable for the damage done. *J., N. W. & S. E. R. R. Co. v. Cox*, 91 Ill. 501; *Kankakee & Seneca R. R. Co. v. Horan*, 17 Brad. 650; *Wood on Nuisances*, 404, 406; *Gould on Waters*, Secs. 271

and 536; Winkler v. Meister, 40 Ill. 349; Peck v. Harrington, 109 Ill. 619.

"Each overflow caused by the negligence or want of skill is an independent wrong, and a cause of action for the damages resulting to crops or other property of the rightful possessor of the land overflowed." The judgment of lower court was affirmed, and, on a "certificate of importance," went to the Supreme Court and the judgment was by it affirmed. O. & M. Ry. Co. v. Wachter, 123 Ill. 440; C., B. & Q. R. R. Co. v. Schaffer, 26 Ill. App. 284.

"The owner of the overflowed land may maintain successive actions when, as in the case of the destruction of crops from year to year, the wrong does not involve the destruction of the entire estate or its beneficial use, and the injuries in different years may be included in a single count." Gould on Waters, 210.

"When successive actions lie, the statute of limitations is not a bar to an action for the continued flooding of land within the statutory period, although the first flowage may be barred. The period of limitation does not begin until actual injury is suffered. Where a stream was obstructed wrongfully, and several years later this act caused the plaintiff's land to be overflowed, it was held that the statute of limitations ran only from the latter event." Gould on Waters, 408.

CONKLING & GROUT, attorneys for appellants.

APPELLEE'S BRIEF.

There is no question as to the amount of testimony aduced in the trial of this cause; indeed, it was voluminous. The doctrine they are doubtless urging is that "where there is a scintilla of evidence in support of a case," it should be left to the jury. This is a dangerous rule, is called the old rule, and is being departed from by nearly every respectable court in the Union. 2 Thompson on Trials, Secs. 2248 and 2249.

It was for the trial court to pronounce the law, on motion

to exclude, and to say whether there was any evidence or not in support of material issues; for the court to say whether there was a scintilla of evidence or not; for the court to say whether there was evidence tending to prove legal damages. Greenleaf's Ev., Sec. 49; 1 Thompson on Trials, Sec. 318.

"A jury can not be permitted to find there is evidence of a fact, when there is not any. The evidence must have legal weight. There is no practical or logical difference between no evidence, and evidence without legal weight." Thompson on Trials, 1604; Conner v. Giles, 76 Me. 132, 134; Phillips v. Dickson, 85 Ill. 15.

B. GALLIGAN and Wm. F. HERNDON, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was an action on the case, brought by the appellants to recover damages alleged to have been occasioned to their land and crops in the years 1889 and 1890, by water, illegally, as they claim, caused to flow upon their premises by the appellee. The appellee pleaded not guilty and that the cause of action did not accrue within five years next before the commencement of the suit. A jury was impaneled, and the evidence for the appellants heard, at the close of which, on the motion of the appellee, the court instructed the jury that the evidence was not sufficient to entitle the plaintiff to recover, and directed that a verdict for the appellee be returned, which was done, and judgment entered accordingly. This is an appeal from that judgment.

The evidence developed these facts: In 1888, the appellants purchased a body of improved and cultivated lands adjoining, upon the east and northeast, a large body of like lands belonging to appellee. There was then upon the lands of the appellee a ditch, constructed by him some twelve years before, which passed, in a northeasterly direction, through an elevation in his lands to the line of the appellants' land. This ditch brought to and emptied upon

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appellants' field the water from some 280 acres of appellee's land, which, in the course of nature, would have flowed in another direction, and not to or upon the field of the appellants. The ditch, however, passed through and collected the water upon some eighty acres of other land of the appellee, the natural flow of which was to and upon the appellants' farm. In the season of 1889 and 1890, this ditch cast upon the appellants' field the water thus naturally and properly flowing toward it, and also the water from the other and larger body of land, which would not, but for such ditch, have flowed there.

These combined waters flooded and damaged the lands and crops of the appellants. The appellee contends that such facts did not create a right of recovery in the plaintiff, and this is the sole question for determination. This involves an examination of the law governing the rights and powers of landed proprietors in draining their lands. While there may be found, in the decisions of the courts of other States conflicting opinions, we think the state of the law is not uncertain in Illinois.

In our State, as respects the rights and burdens of drainage, individuals hold their ownership in land in accordance with the natural conformation of the ground. The right of the owner of the dominant heritage to drainage is based wholly on the principle that nature has ordained such drainage. He may cast upon the servient heritage such water as naturally there descends, and may, in the exercise of good husbandry, collect such water by ditches and discharge it, with increased flow and greater quantity, upon the lower lands, than would in course of nature occur, provided it be discharged into a natural channel or watercourse. This burden the servient proprietor must accept and provide against. The owner of the lower lands is not, however, to be burdened with or damaged by the discharge of water upon his premises, the flow of which has been by the dominant proprietor diverted from its natural course by ditches, and thus brought to his land, when in the course of nature such water, but for the artificial ditches or drains,

would have flowed in another direction, and not upon his land. *Gormley v. Sanford*, 52 Ill. 158; *J., N. W. & S. E. R. R. Co. v. Cox*, 91 Ill. 503; *Peck v. Harrington*, 109 Ill. 611; *Groff v. Aukenbrandt*, 124 Ill. 51. We reach, then, the conclusion, that upon the construction of this ditch a right of action arose for the recovery of any damage occasioned by water improperly brought to and discharged by it upon the lower lands.

Counsel for appellee urge that if such right of action did arise it was for the recovery of all damages, both present and prospective, and that the owner of the lands at that time might have sued for and recovered all damages, past and future, and that such right of action existed for five years and became then barred by the statute of limitations, and that therefore this action can not be maintained.

Whether such right of action for future damages then arose depends upon whether the ditch is to be regarded as a permanent structure. If permanent, the then owner might have at once instituted suit for and recovered not only present but future damages, and such recovery would have operated as a bar to all future actions by such owner or by any one holding under or through him. A failure to bring such action within the statutory period would operate to bar a recovery by the then owner or his grantees. *C. & A. R. R. Co. v. Mahr*, 91 Ill. 312; 5 Amer. and Eng. Ency. of Law, page 20.

It then became important to ascertain whether the ditch in question was in a legal sense permanent. This is not to be determined from a consideration alone of its enduring character, or that if not changed by the hand of man it would likely continue forever. To be permanent in a legal sense a structure must, in addition to being permanent or enduring within itself, be such that its continuation is lawful; because if not lawful it is subject to be removed or abated by a legal proceeding and therefore can not be deemed permanent. *K. & S. R. R. Co. v. Horan*, 131 Ill. 288.

The ditch as constructed by the appellee extended through

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an elevation in his land, and brought through this ridge or elevation, water which, in the course of nature, had its flowage in another direction.

It was therefore unlawful and an invasion of the right of the servient proprietor, and being so, constituted a nuisance (16th Amer. and Eng. Ency. of Law, 924 to 925) and as such was subject to abatement. C., B. & Q. R. R. v. Shaffer, 124 Ill. 121.

A nuisance which may be abated by law is not regarded as a permanent source of injury but as a continuing nuisance. Successive actions for damages occasioned by it may be maintained from time to time as such damages are inflicted. 16 Amer. & Eng. Ency., page 986 and 987; C. & E. I. R. R. v. Lord, 118 Ill. 203; O. & M. R. R. v. Watcher, 123 Ill. 440.

It is true that cases are to be found where the owners of land have treated a structure as a source of permanent injury and brought suit for and recovered both present and future damages, though such structure was unlawful and subject to abatement by legal action. When a structure is in its nature permanent it seems that one damaged thereby may elect to treat it as permanent in law, though he might abate it as a nuisance and may sue for and recover damages, present and prospective. If he does so recover he is to be regarded as having consented to its continuation and both he and others holding through or under him are denied the right of further suit for the recovery of damages.

These cases are not, however, authority in support of the appellee's plea of the statute of limitations, for such actions are not barred by the operation of the statute of limitations, but by the application of just and equitable principles of estoppel and wholly without regard to any period of time. McConnell v. Kebbe, 29 Ill. 443; C. & E. I. R. R. v. Loeb, 118 Ill. 203.

Recovery by subsequent action in such cases is denied because the party damaged sued upon and treated the structure as permanent and recovered damages upon the theory that it was to be maintained forever.

Having done so he is held to have consented to its continuance and to have been compensated therefor by the assessment of future damages in the first action. He can not, nor can any one holding through him, be heard to urge that it is not permanent, upon familiar principles of estoppel. No such prior action was brought by any owner of this land, and for that reason many authorities cited by appellee's counsel have no application to this case.

It must be admitted that expressions of the court to be found in the opinion in the case of *Randall v. Cooper*, 59 Ill. 317, seem to announce that when a wrongful act is done which produces an injury, a right of action at once arises for the recovery of past and future damages. In that case the structure complained of was a flowering mill, lawfully constructed and consequently permanent in a legal sense. The expressions referred to were not necessary to the proper determination of the rights of the parties to the case, and when considered in connection with the later opinions of the court which we have cited, must be given a restricted meaning. Such expressions must be accepted as a recognition of the right of a party injured by a wrongful act or structure in its nature permanent, to elect to consider the same permanent, and sue for and recover damages upon it as such.

If he does, he and his privies will be, as we have seen, estopped from afterward asserting that the structure is not permanent. Thus understood, the expressions referred to are not in conflict with other rulings of the Supreme Court, which we have accepted as stating the correct rule.

Counsel for appellee suggest that appellants purchased their land with a permanent nuisance existing upon it, and are presumed to have paid only the value of the property as thus situated, and therefore had no right of action. This might be true if the nuisance was a permanent one. We have seen that it is not. It was subject to abatement by direct legal proceeding to that end, or successive recoveries of damages may be resorted to to enforce its abatement by the voluntary act of the appellee, to avoid such recoveries. *C. & E. I. R. R. Co. v. Lord*, 118 Ill. 203.

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The presumption, then, is, that appellants purchased in view of the rights thus given them by law. The evidence also tends strongly to show that the appellee promised the appellants before they received title to the lands that he would be at the expense of putting in tile in appellants' land to carry away the water coming from his ditch, and that he failed and refused to do so. This being true, it seems clear that appellants did not, as a matter of fact, buy the lands with the understanding that it was subject to the burdens imposed upon it by the ditch in question.

The appellee contends that, while the proofs may show that the water coming from the ditch inflicted injury and loss upon the appellants, it can not be determined from the evidence to what extent such damages were attributable to the waters which, in the course of nature, would not have flowed there, and that the appellee is only liable for damages occasioned by such waters.

How far one who thus causes injuries may demand the exact ascertainment thereof need not now be determined. We think there are data in the evidence from which such damages might have been ascertained with reasonable certainty. Aside from this, the appellants established, by the evidence, the fact that their legal right had been violated, and this entitled them to recover nominal damages and costs in vindication of their right. 5th Amer. & Eng. Ency. of Law, page 4.

We are constrained to the opinion that the case should have been submitted to the jury for their decision.

The judgment must be reversed and the cause remanded.

Chicago & Alton Railroad Company v. Matthews.

48	361
153	268

1. *Negligence—Railroad Company—Inconsistent Rules.*—A railroad company had two rules, one requiring the brakemen to be on top of the train when approaching a station, so as to keep the train under control, and one forbidding the brakemen from being on top of unusually high

cars when approaching bridges and viaducts. *It was held* that an instruction advising the jury that these rules were not in conflict and that they must be construed together, was properly given.

2. *Master and Servant—Conflicting Rules—Negligence.*—The rules of a railroad company required the brakemen to be on top of the train when approaching a station, and also forbid their being on top of very high cars when approaching bridges and viaducts. In the case at bar, it happened that the train contained a high car and the viaduct was near the station, and while the brakeman was, under one rule, required to be on top of the train, it was his duty, under the other, to avoid the high cars as he neared the viaduct. There were no lights and the night was dark. The court said there was a narrow line between his duty to his employer and a proper regard for his own safety, *and held*, that if the company so arranged matters by allowing a viaduct at a point where a brakeman was required to be on top of the train, and by admitting into the train a car too high to pass safely under the viaduct, with a brakeman standing upon it, and by providing no light or other warning, that it became necessary for the brakeman to incur some risk in performing his duty, and if he, in this seeming conflict between his duty and his safety, used reasonable care and judgment, exercising such caution as a reasonably prudent man would, ordinarily, under like circumstances, then the company ought to compensate him for the injury he received.

Memorandum.—Action for personal injuries. Appeal from a judgment rendered by the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

The opinion of the court states the case.

APPELLANT'S BRIEF.

“If a person, knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein.” *Stafford v. C., B. & Q. R. Co.*, 114 Ill. 244; *Wells v. B., C. & R. Co.*, 56 Ia. 520; 2 Am. & Eng. Ry. Cases, 243; *Clark v. Richmond, etc., R.*, 18 Am. & Eng. Ry. Cases, 78; *C. & A. R. Co. v. Munroe*, 85 Ill. 25; *Gilsen v. Erie R. Co.*, 63 N. Y. 449; *Rains v. St. L., I. & M. R.*, 71 Mo. 164; *Devitt v. P. R. Co.*, 50 Mo. 302; *I. C. R. Co. v. Neer*, 26 Ill. App. 356.

If he places himself in a position of hazard unnecessarily,

and in disobedience of the rules of the employer, the legal consequence is, he can not recover. *Simmons v. Chicago & Tomah R. Co.*, 110 Ill. 340; *Abend v. T. H. & I. R. Co.*, 111 Ill. 202; *Kroy v. R. Co.*, 32 Iowa, 457; *Wood on Master & Servant*, Sec. 403, 187-9; *Thomas v. R. Co.*, 51 Miss. 637; 2 *Rorer on Railroads*, 838; *L. S. & M. S. R. Co. v. Roy*, 5 Brad. 82; *C., B. & Q. R. Co. v. Smith*, 18 Brad. 119; *U. S. Rolling Mill v. Wilder*, 116 Ill. 100; *Gilsen v. Erie R. Co.*, 63 N. Y. 449; *Wood on Master & Servant*, Sec. 383, *et seq*; same, p. 738.

“The whole duty is not on the railroad company. The employe must give heed to the notice and instructions given him, and must employ his senses, his reasoning faculties and his attention, alike for his own safety and the welfare of the road. If he has not been sufficiently warned or notified to enable him, by proper attention and diligence, to learn where the points of danger are, then this would be negligence for which the railroad company would be liable. On the other hand, if he has been sufficiently warned or notified, and from inattention, indifference, absent-mindedness, or forgetfulness, he fails to inform himself, or fails to take the necessary steps to avoid the injury, this is negligence, and he should not recover.” *Louisville & Nashville R. R. Co. v. Hall*, 6 Southern Law Rep. 277 and cases there cited; *Wells v. B., C. & R. Co.*, 56 Iowa, 520.

The rule invoked is also clearly expressed in the following cases: *E. St. L. Packing Co. v. McElroy*, 29 Ill. App. 504; *Day v. T. E. S. & D. R. Co.*, 42 Mich. 523; *A. T. & S. R. Co. v. Plunkett*, 25 Kans. 188; *Clark v. St. P. & Sioux City R. Co.*, 28 Minn. 128; *Goltz v. Winona & St. Peter R. Co.*, 22 Minn. 55; *Raines v. St. L., I. M. & S. R. Co.*, 71 Mo. 164.

WILLIAM BROWN, attorney for appellant.

WILLIAMS & CAPEN, of counsel.

APPELLEE'S BRIEF.

To receive and run an unusually high foreign freight car, in the night time, under a bridge of dangerous proximity

to the top of such car while passing under the bridge, without suspending whipping straps, lights, or other well recognized danger signals, to warn the brakemen of the approach to and nearness of the bridge, is actionable negligence, especially where the bridge is located at a point where brakemen, in performing their duty, must of necessity be on top of the train regulating its speed while passing through a populous city, and the bridge is so obscured by smoke and dust that the brakemen are unable to see or know the exact location of the bridge by the use of their senses unaided by such danger signals. *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 197; *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183; *C. & I. R. R. Co. v. Russell*, 91 Ill. 298; *C. & A. R. R. Co. v. Johnson*, 116 Ill. 206; *Hough v. Railway Co.*, 100 U.S. 213; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88; *Louisville, etc., Ry. Co. v. Wright*, 115 Ind. 378; *St. Louis, etc., R. R. Co. v. Irwin*, 37 Kans. 701; *Shearman & Redfield on Negligence*, 4th Ed., Secs. 198, 200.

A servant is not precluded, as a matter of law, from recovering against his master for an injury suffered through exposure to danger from a defect of which he had only a general notice, if under all the circumstances, a servant of ordinary prudence, acting with such prudence, would have continued the same work under the same risk. All the circumstances must be taken into account, and not merely the isolated fact of risk. It is a question of fact for the jury to determine whether or not, under the given circumstances, the servant acted with due or ordinary care for his safety; and it should be determined by them with reference to the exigencies of the given occasion, in the light of all the surrounding and attendant facts and circumstances. *Kane v. Northern Central Railway*, 128 U.S. 91; *Snow v. R. R. Co.*, 8 Allen, 441; *Patterson v. Pittsburg, etc., R. R. Co.*, 76 Pa. St., 389; *Plank v. R. R. Co.*, 60 N. Y. 607; *Hawley v. N. C. Ry. Co.*, 82 N. Y. 370; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205; *Devlin v. Ry. Co.*, 87 Mo. 545; *Gaynor v. Ry. Co.*, 100 Mass. 208; *Fernandes v. City Ry. Co.*, 52 Cal. 45; *Railroad Co. v. Stout*, 17 Wallace, 657; *L. S. & M. S. Ry. Co. v. Johnsen*, 135 Ill. 647.

C. & A. R. R. Co. v. Matthews.

In determining the question of contributory negligence of an employe whose duty lies in the line of danger, all the circumstances must be considered, particularly those exigencies which render the prompt performance of his duty necessary. The care required of an employe is only that which laborers of ordinary prudence would exercise under like circumstances. *Lee v. Woolsey*, 109 Pa. St. 126; *L. S. & M. S. Ry. Co. v. O'Conner*, 115 Ill. 254.

Reasonable care on the part of a servant in the performance of his work, presupposes the performance by the master of his duty to do all that reasonably lies within his power to protect the servant while so engaged. The servant does not assume any risk which he might reasonably expect would be properly guarded against by the master under the circumstances. *Pantzar v. Mining Co.*, 99 N. Y. 368; *Roesner v. Hermann*, 8 Fed. Rep. 782; *Hayes v. Manuf. Co.*, 48 Hun (N. Y.), 407; *Penn Co. v. Backes*, 133 Ill. 255; *Marwedel v. Cook* (Mass.) 28 N. E. Rep. 140; *St. Ry. Co. v. Williams* (Ill.), 29 N. E. Rep. 672; *Babcock v. R. R. Co.*, 150 Mass. 467.

The yardmaster and switchmen at Brighton Park were not fellow-servants of the appellee. *Rolling Mill Co. v. Johnson*, 114 Ill. 57; *Ry. Co. v. Snyder*, 117 Ill. 376; *R. R. Co. v. Hoyt*, 122 Ill. 369.

The fact that an injury to a servant was caused by the negligence of another servant of the same master, does not excuse the master from liability therefor, where it appears that the injury would not have happened had the master performed his duty. *Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Ellis v. Railroad Co.*, 95 N. Y. 546; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Elmer v. Locke*, 135 Mass. 575; *Paulmier v. R. R. Co.*, 34 N. J. Law, 151; *Johnson v. Telephone Co.* (Minn.), 51 N. W. Rep. 225; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700; *Young v. Ry. Co.*, 46 Fed. Rep. 160; *Griffin v. R. R. Co.*, 148 Mass. 145; *Coppins v. R. R. Co.*, 122 N. Y. 562.

BENJAMIN & MORRISSEY, counsel for appellee.

J. S. EWING, of counsel.

OPINION OF THE COURT.

This case was heard at a former term, 39 Ill. App. 541. It is unnecessary to restate the facts as they are substantially the same as before.

The plaintiff recovered, and the most important question is whether the evidence supports the verdict.

The rules of the company require the brakeman to be on top of the train when approaching a station so as to keep the train under control, and they also forbid brakemen from being on the top of unusually high cars when approaching bridges or viaducts.

The court, at the instance of the defendant (instruction 14), advised the jury that these rules were not in conflict and the jury were thus given to understand that they must be construed together. It happened that the viaduct was near the station in this instance and while the plaintiff was, under one rule, required to be on top of the train to set the brakes, it was his duty to avoid the high car as he neared the viaduct.

There were no whipping straps or lights to advise him of the exact location of the viaduct and the night was very dark, but he knew he was not far from it, and in doing what he regarded as necessary in setting the brakes he was not unmindful of the viaduct, but was mistaken either as to its exact location or as to the speed of the train, and thus received the injury.

There was a narrow line between his duty to his employer and a proper regard for his own safety.

He felt bound to use all practicable effort to set the brakes and at the same time he was compelled to use reasonable care for his own protection. If the master so arranged matters, by allowing a viaduct at a point where the brakeman was required to be on top of the train, and by admitting into the train a car too high to pass safely with a brakeman standing upon it, and by providing no light or other warning, that it became necessary for the brakeman to incur some risk in performing his duty, and if the brakeman in this seeming conflict between his duty and his

safety used reasonable care and judgment, exercising such caution as a reasonably prudent man would, ordinarily, under like circumstances, then the master ought to compensate him for the injury. As we understand the case this is all there is of it and the issue was for the jury under proper instructions.

Without discussing the evidence in detail we are disposed to say that there is no such want of proof either in respect to plaintiff's care or the defendant's negligence as to require us to set aside the judgment.

Was there any substantial error in giving or refusing instructions?

For the plaintiff the court gave nine instructions, covering four pages of the printed abstract; for the defendant fifteen, covering six pages. The court also modified and gave as modified four other instructions for defendant and refused to give eight others. It would be singular if in all these there appears no ground for criticism, and doubtless there is some want of accuracy amounting to technical error.

But after carefully considering the whole we are of opinion that the rights of appellant were not prejudiced in any appreciable degree by the action of the court in this regard.

We shall not follow *seriatim* the objections suggested in the brief, and will notice only such as seem to us the more important.

1st. It is urged that the court left it to the jury to construe the rules offered in evidence. To this it may be answered that while it was for the court to construe the rules if a construction was necessary, still the real question was whether the apparently conflicting rules were to be construed together, or rather, when, by reason of the peculiar situation they seemed to conflict, whether they were to be so construed. The court advised the jury that these rules were not in conflict and must be construed together, thus placing the matter before the jury to determine whether, in complying with all the rules as far as the situation would permit, the plaintiff used proper care for his own safety.

Of this we think the defendant could make no just complaint.

2d. It is urged that the court erred in refusing instructions to the effect that if the plaintiff knew of the proximity of the viaduct the want of signals was not important. The substance of this proposition is involved in the 2d and 3d, and perhaps by implication in other instructions which were given. These refused instructions were somewhat loose and misleading. If the plaintiff knew accurately where he was he could not complain that there were no signals; but it is apparent that he only knew he was approaching the viaduct and that he was not forgetful of it. Hence the question recurs whether, in what he did, he was unduly careless of himself in his effort to perform his duty of setting the brakes; and so it appears that from whatever standpoint the case is considered, this was the controlling question, it being, as we think, not a matter of doubt that he was not responsible for the height of the viaduct or of the foreign car, and that he was only bound to use reasonable care in view of a situation for which the master was responsible.

3d. The 2d refused instruction is in substance the same as the 2d given for defendant.

4th. All that was material in the 3d refused, is found substantially in the 14th and 15th given, and in the 4th of the modified instructions.

5th. The 4th and 5th refused, were imperfect in their attempted application of the rule of fellow-servants, and there was no error in refusing them.

6th. The 7th and 8th were properly refused because they undertook to say that the position of the foreign car in the train was immaterial. Whether this was so or not was for consideration of the jury, in connection with the other circumstances in proof.

Two objections to the rulings of the court in admitting testimony are specified in the brief, but they are not noticed in the argument, and it may be assumed they are abandoned.

Finding no substantial error prejudicial to the appellant, we are of opinion the judgment should be affirmed.

Herring v. Ervin.

Herring et al. v. Ervin et al.

1. *Intoxicating Liquors—Injuries Occasioned by the Sale of—Damages.*—Under the statute giving a remedy for injuries occasioned by the sale of intoxicating liquors, the family of the inebriate may be injured on their means of support, although not deprived of the bare necessities of life, and whatever lessens or impairs the ability of the husband and father to supply the suitable comforts which might reasonably be expected from one in his occupation and with his capacity for earning money, may be regarded as lessening or impairing this means of support.

2. *Damages.*—In trials under the act giving a remedy for injuries caused by the sale of intoxicating liquors it is not necessary that any witness should point out by his testimony any definite basis upon which to estimate the damages. If there is enough when all the evidence is considered to make the inference reasonably clear, the proof is sufficient.

Memorandum.—Action for selling intoxicating liquors. Appeal from a judgment for the defendants, rendered by the Circuit Court of McDonough County; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

APPELLANTS' BRIEF.

“Means of support,” in its general sense, embraces all the resources from which the necessities and comforts of life are or may be supplied, such as lands, goods, salaries, wages, or other sources of income. In a limited sense it signifies any resource from which the wants of life may be supplied. *Meidel v. Anthis*, 71 Ill. 246.

There is a legal obligation on the part of the husband to support his wife; and this support is not limited to supplying the bare necessities of life, but includes comforts and whatever is suitable to the wife's situation and the husband's condition in life; and whatever lessens or destroys the husband's ability to supply her with suitable comforts, to that extent injures her means of support, even though she is not thereby deprived of the necessities of life. *McMahon et al. v. Sankey*, 133 Ill. 643.

Means of support relate to the future as well as to the present. It is enough that the wife shows that the sources of her future support have been cut off, or diminished below what is reasonable and competent for a person in her station in life, and below what they otherwise would have been. *McMahon v. Sankey*, 133 Ill. 644.

AGNEW & VOSE, attorneys for appellants.

BAILEY & HOLLEY and SHERMAN & TUNNICLIFF, attorneys for appellees.

OPINION BY THE COURT.

The plaintiffs were defeated in an action on the case against the defendants, for selling intoxicating liquors to Thomas Herring, the husband and father of the plaintiffs.

Without going into an exposition of the evidence we may state the conclusion which we think legitimately flows from it, *i. e.*, that the plaintiffs were entitled to a verdict.

It is clear that Thomas Herring was intoxicated repeatedly as the result wholly or in part of liquors furnished him by the defendants, and that in consequence thereof he neglected his affairs and wasted his time, whereby the support which the plaintiffs would otherwise have received and which was their legal due, was substantially impaired and diminished.

According to the interpretations the Supreme Court have placed upon the statute giving the remedy here sought, the family of the inebriate may be injured in their means of support although not deprived of the bare necessities of life.

Whatever lessens or impairs his ability to supply the suitable comforts which might reasonably be expected from one in his occupation and with his capacity for earning money may be regarded as lessening or impairing their means of support. *McMahon v. Sankey*, 133 Ill. 636.

In *Meidel v. Anthis*, 71 Ill. 246, the husband was a farmer—

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as he was in the present case—and it was held that if his capacity to cultivate land was sensibly diminished by the habit of drinking, the wife had a cause of action.

Here the husband was a farmer living on rented land, and there could have been no doubt, as we read the evidence, that his income was sensibly diminished, to the detriment of those who were dependent upon him for support. It is, of course, difficult to say how far the plaintiffs were injured by the acts of the defendants; nor was it necessary that any witness should point out by his testimony any definite basis upon which to make the estimate. If there is enough, when all the evidence is considered, to make the inference reasonably clear, then the proof is sufficient. In view of the evidence, we can see no reason for refusing the third instruction asked by the plaintiff, which reads as follows:

“3. The jury are instructed that in determining what facts are proven in this case, they should carefully consider all the evidence before them, with all the circumstances of the transaction in question as detailed by the witnesses, and they may find any fact to be proven which they think may be rightfully and reasonably inferred from the evidence given in the case, although there may not be any direct testimony as to such fact.”

The instructions given for the defendants quite explicitly impressed upon the jury that the plaintiffs were bound to make out their case, as alleged, by the preponderance of the proof, and it was proper that the jury should have the benefit of this instruction in order properly to determine what was logically established by the proof. The judgment will be reversed and the cause remanded.

Bayles v. Burgard.

1. *Relation of Master and Servant in Actions for Seduction.*—Where it appeared that a daughter, though an adult, had, since arriving at her majority, resided with her father as one of his family the same as when in her minority, and had since her mother's death, a period of seven

years, been his housekeeper and cared for his minor children, occasionally, with her father's consent, doing washing and other housework away from their home, etc., *it was held* that the relation of servant to her father was sufficiently shown to sustain an action for the seduction of the daughter.

2. *What is Necessary to be Shown.*—Only slight acts of service are necessary to create the relation of master and servant when an adult daughter resides with her father so as to enable him to maintain an action for her seduction.

3. *Loss of Service—Constituents of the Action.*—Loss of service is theoretically necessary to support an action for seduction, but only slight evidence of such loss is required for the reason that the loss of the comfort and society of the daughter and honor of the father and the family are the real constituents of the action.

4. *Special Verdicts.*—Special verdicts should not be asked upon immaterial and inconclusive actions.

Memorandum.—Action for seduction. Writ of error to the Circuit Court of McDonough County, to reverse a judgment of \$750 for plaintiff below; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

The opinion of the court states the case.

PLAINTIFF'S BRIEF.

In order for the plaintiff below to recover he must show that he had the legal right to control the services of his daughter at the time of the alleged seduction. *Ball v. Bruce*, 21 Ill. 161; *White v. Murtland*, 71 Ill. 250; *Anderson v. Ryan*, 3 Gilm. 583. Plaintiff must prove a seduction before damages can be awarded to him. *Sedgwick on Damages*, 682; *White v. Murtland*, 71 Ill. 250. If a special finding is submitted to the court, which is pertinent to the issues and necessarily to be determined by the jury, the court must give it to the jury. *Bent v. Philbrick*, 16 Kan. 190. Each special finding submitted to the jury should be limited to a single direct and material controverted issue of fact and should be so framed as to admit of a positive, direct and intelligible answer. *Jewell v. Chicago, etc., R. R. Co.*, 54 Wis. 610; *Carroll v. Bohan*, 43 Wis. 218; *Rosser et al. v. Barnes et al.*, 16 Ind. 502.

Bayles v. Burgard.

BREEDEN & SWITZER, and AGNEW & VOSE, attorneys for plaintiff in error.

BRIEF OF DEFENDANT IN ERROR.

All that is necessary for the plaintiff to show upon that issue is, that he is the father of the girl; that she resided with him and performed services for him at the time the alleged seduction and abortion took place. 3 Sutherland on Damages, 738; Anderson v. Ryan, 3 Gilman, 583; Ball v. Bruce, 21 Ill. 161; Gray v. Durland, 51 N. Y. 424; Lipe v. Eisenlerd, 32 N. Y. 229.

The court may modify a question offered for special finding by the jury, so that the same shall have reference to an issue as made by the pleadings in the case, in regard to a fact that must be affirmatively shown before a verdict can be sustained. C. & N. W. Ry. Co. v. Bouck, 33 Ill. App. 123; T. H. & I. Ry. Co. v. Voelker, 31 Ill. App. 315; C. & N. W. Ry. Co. v. Dunleavy, 129 Ill. 146.

Special findings that are immaterial, inconclusive, those which draw legal conclusions only, and those which find the evidence only and not the fact, should not be submitted. Mays v. Foster, 26 Kan. 518; Peckdolt v. Grand Rapids & C. R. R. Co., 15 N. E. Rep. 686; Sanders v. Weelburg, 107 Ind. 266; 2 Thompson on Trials, 2038; L. E. & W. R. R. Co. v. Morain, 36 Ill. App. 632.

H. H. HARRIS and PONTIOUS & MICKEY, attorneys for defendant in error.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

Burgard obtained a judgment in the court below against Bayles for the seduction of an adult daughter, to reverse which judgment this writ of error was sued out.

The daughter, though an adult, had, since arriving at her majority, resided with her father as one of his family the same as while a minor. Since her mother's death, and for a period of seven years, she had been his housekeeper and cared for his minor children. She occasionally, with her father's

consent, did washing and other housework away from their home, her earnings on such occasions being divided between them. When the sexual intercourse complained of occurred she was thus temporarily at the house of Bayles, by an arrangement made by Bayles with the father.

The relation of servant to the plaintiff is, we think, sufficiently shown. Only slight acts of service are necessary to create the relation and sustain the right of action for seduction where an adult daughter resides with the father. *Ball v. Bruce*, 21 Ill. 161; *Greenleaf Evidence*, 2 Vol., Sec. 576.

We think there is sufficient evidence to uphold a verdict of seduction by the plaintiff in error, and loss of service to the plaintiff below, occasioned thereby.

Loss of service is theoretically necessary to support an action for seduction, but only slight evidence of such loss is required, for the reason that the loss of the comfort and society of the daughter and of the honor of the father and the family, are the real constituents of the cause of action.

The refusal to give instruction No. 7 does not warrant a reversal.

The principle imperfectly announced in this instruction is fully and correctly given in the second instruction on behalf of the plaintiff in error. Nor was it error to refuse to submit the special verdict asked by the appellants.

Special verdicts should not be asked upon immaterial and inconclusive questions.

The ultimate fact, not the evidence supposed to support such fact, should be asked for. The court might, we think, have properly refused to submit each of the special questions asked by the plaintiff in error, and, as modified by the court, they were still more favorable to the plaintiff than the law warranted.

We do not find any such error as demands a reversal, and think the judgment right upon the merits. It must be affirmed.

Switzer, Special Admr., etc., v. Kee.48 375
146s 577

1. *Implied Contract to Pay for Services Rendered.*—Where an aged woman, helpless from age and disease, and in need of assistance and nursing, is, with her consent, taken to the house of her son for such care and treatment as she required, *it was held*, that while she may not have been fully competent to make a contract involving details, she evidently understood that the services she was to receive would not be gratuitous, and a judgment for \$1,200 was sustained.

Memorandum.—Claim against the estate of a deceased person for services. Appeal from a judgment in favor of the claimant rendered by the Circuit Court of McDonough County, on appeal from the Probate Court; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

The opinion of the court states the case.

APPELLANT'S BRIEF.

Where support is furnished by parent to child or child to parent, there can be no recovery for services or support unless an express promise to pay is shown. *Faloon v. McIntyre*, 118 Ill. 292; *Leidig v. Coover's Ex'rs*, 47 Pa. St. 534; 2 Beas. (N. J.) 141.

Where the relationship of parent and child exists, the law presumes there is no contract to pay for support or services. *Miller v. Miller*, 16 Ill. 295; *Brush v. Blanchard*, 18 Ill. 46; *Meyer v. Temme*, 72 Ill. 574; *Griffin v. First National Bank of Morrison*, 74 Ill. 259; *Patterson v. Collar*, 31 Ill. App. 340.

The ordinary expressions of gratitude and statements of a desire to pay for services can not be construed into a contract. *Hall v. Finch*, 29 Wis. 278; *Duffey et al. v. Duffey*, 44 Pa. St. 402; *Sculley v. Sculley's Executors*, 28 Iowa, 548; *Coe v. Wagner*, 42 Mich. 49; *Williams v. Hutchinson*, 3 N. Y. 312.

The condition of the mind of the person supported, can not be shown for the purpose of proving a contract. *Peck v. McKean*, 45 Iowa, 18; *Smith v. Johnson*, 45 Iowa, 308.

If a person expects to receive compensation from one source he can not afterward claim it from another. *Hedrick v. Wagoner*, 8 Jones (N. C.) 360; *Everett v. Walker* (N. C.) 13 S. E. Rep. 860.

Where the wife labors for another person with the husband's assent she is absolutely entitled to receive and hold the wages from such labor. *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Kase v. Painter*, 77 Ill. 543.

AGNEW & VOSE, attorneys for appellant.

APPELLEE'S BRIEF.

A contract by a parent to pay for services rendered by a child may be implied from circumstances. *Fruitt v. Anderson*, 12 Brad. 421; *Miller v. Miller*, 16 Ill. 296; *Martin v. Wright's Adm.*, 13 Wend. 460; *McGarvey v. Rood's Adm.* (Iowa), 35 N. W. Rep. 488; *Scully v. Scully, Ex'rs.* 28 Iowa, 548; *Cowan v. Musgrave, Ex'r*, 35 N. W. Rep. (Iowa) 496.

Insane persons are liable for necessities furnished them. *La Rue v. Gilkyson*, 4 Pa. St., 375. A child may recover for necessities furnished insane parent under implied contract. *Fruitt v. Anderson*, 12 Brad. 421; *Reando v. Misplay*, 90 Mo. 251; *Broderick v. Broderick*, 28 W. Va. 378; *Brock v. Cox*, 38 Mo. App. 40. If a wife performs services merely as helpmate and assistant to husband in his business or about his affairs, the husband is entitled to receive the pay therefor. *Flynn v. Gardner*, 3 Brad. 253; *Cunningham v. Hanney et al.*, 12 Brad. 437.

BAILY & HOLLY, attorneys for appellee.

OPINION OF THE COURT.

The appellee filed a claim against the estate of Mary Kee, deceased, for services rendered in taking care of the decedent, during the last two or three years of her life.

The case was removed by appeal to the Circuit Court where the issue was submitted to a jury resulting in a verdict in favor of the claimant for \$1,200.

Switzer v. Kee.

The court refused a new trial and rendered judgment on the verdict.

The claimant was the son of the deceased and the services were rendered while she was in his house.

For a long time after the death of her husband, she remained with a granddaughter on the homestead. Becoming quite feeble and helpless from age and disease she needed a great deal of assistance and nursing, which was rendered by her children and other persons living in the neighborhood. Finally, it was suggested to her and to the claimant, by the attending physician, that a better, and indeed, a necessary arrangement would be, that she should be taken to the house of the claimant for such care and treatment as she required. With some reluctance she agreed to go, seeing it was necessary that some better provision should be made, and that, as her infirmities were increasing, she could no longer have suitable attention while remaining in her own house. She fully understood the matter, and while nothing was said as to the terms, and while she was perhaps not fully competent at all times to make a contract involving details, she evidently understood that the services she was to receive would not be gratuitous, and it is quite as clear the claimant expected to be paid. We do not care to quote the evidence on this point but we are persuaded there is enough in it to warrant the jury in finding that there was an expectation on both sides that the claimant should have proper compensation.

Certainly she was not residing with her son as a member of his family in the ordinary sense of the term.

While she was able to take care of herself and long after, she preferred to stay in her own home—and when she went to her son's it was for the express purpose to be cared for as an invalid and for no other.

Her illness was protracted and distressing and she required attentions involving great sacrifice of time and comfort on the part of her son and his wife. They attended to her personally and employed male and female help to take their places as far as necessary in the duties of the household and farm.

The amount allowed by the jury is quite within the range of the proof and, upon the merits, we think the verdict was right.

We find no substantial error in the rulings of the court upon the trial and are of opinion the judgment should be affirmed, which is done.

Stewart v. Wood.

1. *Waste—Deeds and Reservations.*—A father conveyed land to his daughter with the following reservation in the deed: “Unto said grantors the full and entire *profits, use and control* of all the above described premises *during the natural lives* of said grantors.” Ten acres of the tract was timber land, upon which a son cut and felled trees under a license, or by authority from his father, the grantor. In action against him for waste, the Circuit Court ruled that the grantor in the deed reserved, by the clause in question, only a life estate, and that the right to cut timber under it, was restricted to three purposes: (1) such as was necessary for improvements on the premises in ordinary repairs; (2) a sufficient amount for ordinary firewood for the grantor, his wife, and the tenants thereon; (3) such timber as was going to decay. On appeal, *it was held* to correctly state the rule.

2. *Waste—The American Rule.*—The American doctrine as to such rights somewhat enlarges the common law rule and applies in particular cases only; as, if the estate be wholly wild and uncultivated, a part of it may be cleared for cultivation, leaving sufficient timber for the permanent use of the farm.

3. *Waste—Defense—Justification.*—The fact that the estate in remainder is benefited, or not injured, by the acts of the tenant for life, is always stated as a justification for a departure from the rule at common law.

4. *Waste—The American Rule.*—The rule is that whatever does lasting damage to the freehold or tends to the permanent loss of the owner of the fee, or destroys or lessens the value of the inheritance, is deemed waste.

5. *Conveyances—Reservation of Profits.*—A reservation in a deed of the “full and entire profits” of land for life does not in any correct sense, either popular or technical, reserve any part of the estate or body of the land itself, but only the “profits” arising out of such use as may be made of the property without impairing the freehold estate.

Memorandum.—Action of case for waste, with a count in trover. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS

Stewart v. Wood.

EPLER, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE CASE.

In 1886, Ira E. Stewart, the father of the two contending parties, made a distribution, by deed, of his landed estate, to his two children, in each of which he made, in the *habendum* clause, a reservation or (more technically speaking) an exception, which is in the words and figures following, viz: "Reserving, however, unto said grantors (Ira E. Stewart and wife, Elizabeth), the full and entire profits, use and control of all the above described premises, during the natural lives of said grantors." Some twenty acres of this estate being grown in timber, a fence row was cut, on the north line of appellee's and south line of appellant's tract. Afterward, and since appellee got her deed from her father and mother, she claims that appellant cut and felled timber on the tract, on her side of the fence row, and hauled it off in the shape of rails, poles, fire-wood, etc. She sued in case and trover. The defense was that Stewart had his father's license, leave and direction to cut these trees; and that being so, his acts were such in the cutting of the timber as a prudent farmer would do with his own land, having regard to the reversionary interest.

APPELLANT'S BRIEF.

"Whatever may pass by words of grant, may be excepted by like words, and the same consequences attach to such an exception as would have attached to such, had it been a grant. Such as, that it carries with it, constructively to the grantor making the exception, all the necessary means of enjoying it or availing himself of it," etc. 2 Washburn on Real Property, 644.

OSCAR A. DE LEUW and F. D. McAVOY, attorneys for appellant.

APPELLEE'S BRIEF.

Washburn on Real Property says, in Vol. I, p. 147, § 3:

“Waste, in short, may be defined to be whatever does a lasting damage to the freehold or inheritance and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance.” The owner in fee has sustained actual damages; the action of waste is maintainable. *Page v. Davidson*, 22 Ill. 112; *Wait’s Actions and Defenses*, Vol. II, p. 121. Cutting timber is waste. *Ibid.*, Vol. III, p. 62. An action of waste is maintainable against a stranger. *Ibid.*, Vol. II, p. 112, and Vol. VI, p. 252.

MORRISON & WHITLOCK, and M. T. LAYMAN, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This is an appeal from a judgment rendered in favor of the appellee in the sum of \$34 in an action on the case in the nature of an action of waste with a count in trover added. Ira E. Stewart and wife conveyed ninety acres of land to the appellee, the deed containing this reservation: “Reserving, however, unto the grantors the full and entire profits, use and control of all the above described premises during the natural life of the grantors.” Ten acres of the tract conveyed was timbered land, upon which the appellant cut and felled trees under license or by authority, as he claimed, from Ira E. Stewart, the grantor aforesaid. The judgment was for the damage thus done to the reversionary estate of the appellee.

The Circuit Court ruled that the grantor in the deed reserved by the clause in question only a life estate, and that the right to take and cut timber under it was restricted to three purposes: (1) Such as was necessary for improvements on the premises in ordinary repairs; (2) a sufficient amount for ordinary firewood for Ira Stewart, his wife and the tenants thereon; (3) such timber as was going to waste or decay.

The privileges in regard to cutting and felling trees thus accorded the grantor are practically such as the law awards

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to the owner of a life estate. It is insisted, however, that while such was the rule at the common law, that it no longer prevails in America. The American doctrine as to such rights, somewhat enlarging the common law rule, applies in particular cases only; as, if the estate be wholly wild and uncultivated, a part of it may be cleared for cultivation, leaving sufficient timber for the permanent use of the farm, and other like exceptional cases, having no similarity to the case at bar. Even in such exceptional cases, the fact that the estate in remainder was benefited, not injured, by the acts of the tenant for life, is always stated as a justification for the departure from the rule at common law.

That rule is, that whatever does lasting damage to the freehold, or tends to the permanent loss of the owner of the fee, or destroys or lessens the value of the inheritance, is deemed waste, and this rule has been kept steadily in view, and recognized as correct in, we think, all cases relied upon as authority in support of the more liberal American rule. In support of these views, see Wharton, Real Prop., page 147, Sec. 3; C. & A. R. R. Co. v. Goodwin, 111 Ill. 273; Kent's Com., Vol. 4, pages 85 and 86.

It is, however, urged that the particular words employed in the clause of reservation, if given their common and popular meaning, would entitle the grantor to greater privileges than the law gives to the holder of a life estate. We do not think so. A reservation of "the full and entire profits" of land for life does not, in any correct sense, either popular or technical, reserve any part of the estate or body of the land itself, but only the "profits" arising out of such use as may be made of the property without impairing the freehold estate. No one would suppose that one having the right to enjoy the use and profits of real property, might or could sell the property itself, or a portion of it, as timber growing upon it, and have the proceeds regarded as "profits."

If the rights of the grantors depended alone upon the words of the reserving clause construed according to the common acceptation and meaning of the words used, aided

in no respect by the rules of law fixing the rights of a tenant for life, we do not think privileges would be given the owner of the life interest other than were accorded by the court below in this case.

We think the rulings of the Circuit Court were correct, and we find abundant competent evidence to support the finding of the jury.

The judgment must be affirmed.

Schoen v. Schoen.

1. *Divorce—Instruction Assuming a Conclusion.*—Upon the trial of a divorce suit upon a bill by the husband, charging desertion, and a cross-bill by the wife, charging cruelty, it is error to charge the jury that if they believe, from the evidence, that at the times the cruelty as charged in the cross-bill, are alleged to have been committed, the wife was suffering from hysteria or other illness, and that the tendency of her illness was to derange, or partially derange, her mental faculties and to give her false and imagined views and impressions of what actually occurred, and if the jury further believe, from the evidence, that her mind at those times was so affected, then these facts are proper to be taken into consideration by the jury, in connection with all the other evidence in the case, in determining what degree of credibility should be attached to her testimony relating to such offenses, because it assumes a conclusion which might or might not be deducible from the evidence, it appearing from the evidence that appellant was in poor health at times, and that, at times, she was considerably excited, but there was no evidence to show that she was suffering from hysteria, or that her illness was of such a character as to affect her mental capacity to state truthfully what occurred.

2. *Desertion—Reasonable Cause.*—A wife may for “reasonable cause” decline to live with her husband, though she may not have sufficient statutory ground for divorce. In such case she may require him to contribute to her support, and so it is error in a proceeding for divorce on the ground of desertion, and a cross-bill alleging extreme and repeated cruelty, to charge the jury that as far as relates to the alleged acts of cruelty, if they believe from the evidence that the wife did leave the husband and remained away, as charged, then, to justify such leaving and absence on the ground of cruel treatment, the jury must believe from a preponderance of the evidence, that the husband actually committed

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an act, or acts of personal violence to her person, prior to the time of the alleged desertion.

3. *Divorce—Desertion—Cruelty.*—It is a condition of the right of divorce on the ground of desertion, that the desertion was without any reasonable cause, but it is not necessary that there should be personal violence before the wife may withdraw from the husband. When he pursues a persistently unjustifiable and wrongful course of conduct, which will necessarily and inevitably render her life miserable and unendurable, she has reasonable cause for leaving him and may interpose it as an answer to a charge of desertion.

Memorandum.—Divorce. Appeal taken from a decree upon a cross-bill in favor of the defendant, rendered by the Circuit Court of Macoupin County; the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this Court at the May term, A. D. 1892. Opinion filed October 17, 1892.

R. E. DORSEY and A. N. YANCEY, attorneys for appellant.

R. B. SHIRLEY, attorney for appellee.

OPINION BY THE COURT.

The appellee filed his bill for divorce against the appellant charging her with having deserted him without reasonable cause for two years prior to the filing of the bill. The appellee answered denying that she acted without reasonable cause and averring cruel and unkind treatment as an excuse for absenting herself from the appellant. She also filed her cross-bill alleging that appellant had been guilty of extreme and repeated cruelty, and asking for a divorce in her favor. To this the appellee filed an answer denying the matters alleged against him. The issues were submitted to a jury, and a verdict was returned finding for the appellee upon the original and the cross-bill. A motion by the appellant for a new trial was denied, and a decree passed, granting a divorce to the appellee upon the original bill and dismissing the cross-bill.

The appellant assigns error upon the action of the court in regard to various matters, but it is not deemed necessary to notice all the objections thus made.

The evidence consisted mainly of the testimony of the two parties.

The appellant, admitting in substance that she absented herself from the appellee, insisted that she was warranted in so doing by his treatment of her, and alleged that he was not only guilty of the most unkind and abusive conduct, but of extreme and repeated cruelty. He denied all this and insisted that his conduct was always kind and considerate, but that she was unreasonable and exacting, and that she had no just cause for leaving him.

Complaint is now made that the court gave the following instructions at the instance of appellee:

“First. The court instructs the jury that if they believe, from the evidence, that at the times the cruelty charged in the cross-bill is alleged to have been committed, Mrs. Schoen was suffering from hysteria or other illness, and that the tendency of her illness was to derange or partially derange her mental faculties, and to give her false and imaginative views and impressions of what actually occurred, and if the jury further believe from the evidence that the mind of Mrs. Schoen at those times was so affected, then these facts are proper to be taken into consideration by the jury in connection with all the other evidence in the case in determining what degree of credibility should be attached to her testimony relating to such offenses.

“Fourth. The court instructs the jury, as far as relates to the alleged acts of cruelty, that if they believe from the evidence that Mrs. Schoen did leave her husband, and remained away from him, as charged in the bill, then, to justify such leaving and absence upon the ground of cruel treatment, the jury must believe, from a preponderance of the evidence, that her husband actually committed an act or acts of personal violence to her person prior to the time of the alleged desertion.”

We think the first instruction should not have been given. It assumes a conclusion which might or might not be deducible from the evidence. While it appears that the appellant was in poor health at times, and that at times she was considerably excited, yet there was nothing to show that she was suffering from hysteria, or that her illness was of such a character as to affect her mental capacity to state truth-

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fully what occurred. The jury, in their consideration of her evidence, might possibly have felt a degree of uncertainty as to how far she may have exaggerated the facts by reason of her physical condition, and they might perhaps have found some warrant for supposing that her memory was at fault. Of this they should have been left to judge without the very suggestive intimation found in this instruction.

Coming from the court, it was well calculated to deepen and strengthen any impression they may have had in regard to it, and we are of opinion the rights of the appellant were prejudiced unduly thereby. The testimony was in such a state that it was necessary the instructions should be accurate and free from assumption as to any matter whereon there was conflict, and especially as to any point which was merely a matter of inference and not of direct proof. We think there was no such evidence as to warrant us in saying that this instruction would not mislead the jury, and, on the contrary, we are of opinion that in the state of proof shown by the record it was error to give it.

The fourth instruction was erroneous in that it required as a justification for living apart from her husband that he had "actually committed an act or acts of personal violence to her person prior to the time of the alleged desertion."

The wife may for "reasonable cause" decline to live with her husband, though she may not have sufficient statutory ground for a divorce, and in such case she may require him to contribute to her support. *Johnson v. Johnson*, 125 Ill. 510.

It is a condition of the right of divorce on the ground of desertion that the desertion was "without any reasonable cause."

It is not necessary that there should be personal violence before the wife might withdraw from her husband.

When he pursues a persistently unjustifiable and wrongful course of conduct, which will necessarily and inevitably render her life miserable and unendurable, she has "reasonable cause" for leaving him, and may interpose it as an answer to his charge of desertion.

It will not do to say that where the wife is defending on a charge of desertion, she must show personal violence in order to sustain her allegations of reasonable cause.

In this case the wife averred much in the conduct of the husband that was calculated to make her life miserable and unendurable—in addition to the alleged acts of personal violence. Whether her allegation in this respect was true, if there was no violence, was for the jury to determine, and if true, whether it would constitute reasonable cause, was also for the jury, under proper instructions.

It may, perhaps, be said that if the jury disbelieved her as to the acts of personal violence they would also disbelieve her as to the other matters of unkindness and ill treatment, but this does not necessarily follow.

The jury may have thought she exaggerated and overstated the occurrences to which she testified, and that, while she had not been subjected to physical violence, she still had reasonable cause for absenting herself from her husband.

Had this instruction been so drawn as to confine it to the issue arising on the cross-bill, it would be quite another matter; but it was not so limited, and we can not say that it would not naturally be considered by the jury as applicable upon the issue arising on the original bill also.

If so regarded by the jury they were certainly misled by it. Because of this and the first instruction, the decree will be reversed and the cause remanded for another trial.

Dorsey v. Williams.

1. *Owners of Animals Engaged in a Common Undertaking, the Design of Which is to Obtain an Award.*—Where the owners of animals are engaged in a common undertaking, the design of which is to secure a sum of money offered for a display of all the animals together, they will not be classed as strangers in the execution of the enterprise; privity with each other, and a direct promise to pay is not necessary to enable one to recover from another money received by him as his share of the premium money.

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2. *Transfers of Property between Husband and Wife.*—Transfers of personal property between husband and wife are valid under the statute, though not in writing, except as against the rights and interests of third persons.

3. *Trial by the Court—Presumptions.*—When a cause is tried by the court the presumption is that only proper evidence was considered, and in such case the admission of improper evidence will not warrant a reversal if there is sufficient evidence to support the judgment.

Memorandum.—Action of assumpsit for money had and received. Appeal from a judgment in favor of the plaintiff for \$108 rendered by the Circuit Court of Macoupin County; the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

The opinion of the court states the facts.

APPELLANT'S BRIEF.

The statute provides that no transfer of property between husband and wife shall be valid as against the rights and interest of any third party, unless such transfer or conveyance be in writing, acknowledged and recorded, etc. Revised Statutes, Chap. 68, Sec. 9.

"A party to a contract is not liable thereon to third persons not party thereto, and between whom and himself there is no privity of contract." *Rossman v. Townsend*, 17 Wis. 98.

"Implied undertaking can not arise as against one benefited by work performed when such work was done under a special contract with other persons." *Walker v. Brown et al.*, 28 Ill. 378; *Massachusetts Gen. Hospital v. Fairbanks*, 129 Mass. 78.

In America, as well as in England, there has been no little fluctuation concerning the right of a stranger to enforce a promise made for his benefit. But it has been held that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration and promise, will not support an action as to the latter. *Story on Contracts*, 485; *Exchange Bank v. Rice*, 107 Mass. 37; *Boston Ice Company v. Potter*, 123 Mass. 28; *Carpen v. Hall et al.*, 29 Ill. 512.

A. N. YANCEY, attorney for appellant.

APPELLEE'S BRIEF.

The action for money had and received may be maintained wherever the defendant has obtained money of the plaintiff, which in equity and good conscience he has no right to retain. * * * * * When money has been thus received the law implies a promise to pay, notwithstanding there was no privity between the parties. *Buckner v. Patterson*, Litt. Sel. Ca. 234; *Taylor v. Taylor et al.*, 20 Ill. 650.

R. B. SHIRLEY, attorney for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

A premium of \$500 was awarded by the St. Louis Fair Association for the exhibition of a stallion and five of his colts. The successful stallion belonged to Capt. A. Hulse; the colts, one to the appellee, two to the appellant, one to a Mr. Rigsby, and the other to a Mr. Cundall. By consent of the owners, these animals were exhibited together, being, while at the fair, in charge of the appellant, who defrayed the expenses of all of them. The colt of appellee was accompanied by its dam, and while at the fair the appellant, without the knowledge of the appellee, entered the dam as a competitor in the "light roadster" ring and obtained the sum of \$50, awarded as premium upon the mare. The appellee claimed that the appellant received a one-sixth part of the \$500 belonging to her as the owner of one of the colts, and brought this, an action upon the common money counts, in assumpsit, to recover such one-sixth portion and also the premium of \$50 awarded for the exhibition of the mare in "roadster ring." A trial before the court, without a jury, resulted in a judgment in favor of the appellee for the amount claimed, less \$25 allowed the appellant for the expenses, his compensation, etc. This is an appeal from that judgment. As to the \$50 premium received by the appellant upon the mare, no defense whatever appears, nor is any seriously urged. The appellee sought to show that by agreement between her husband, as her agent, and Capt.

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Hulse, the owners of the animals exhibited together were to pay the expenses and share equally the premium, if a premium was obtained. It may be conceded, however, that the evidence does not sufficiently connect the appellant with this arrangement to bind him. The appellant sought to prove that Capt. Hulse was the agent of the appellee, and in that capacity contracted with him to take appellee's colt with the others to the fair at his (appellant's) expense, the premium, if any, to belong to the appellant.

The proof, however, fails to show that Capt. Hulse had authority to make such contract for the appellee. The rights of the parties can not, therefore, be made to depend upon either of these alleged agreements. It appears, however, that the premium awarded the stallion and colts was paid to Capt. Hulse, who disposed of it, to quote his testimony, as follows: "I divided it into six pieces. I took out the amount for my horse and then said to Dorsey (the appellant), there is six—you have charge of three. Here is your three—the Williams colt and your two colts is three. Here is \$250 and here is Rigsby's money, take that to him, and Cundall's I will take to him." Hulse thereupon paid the appellant, Rigsby, one-sixth and \$250, being the amount for the two colts of his own and the colt of the appellee. One-third of this \$250, in the absence of any agreement to the contrary, was the money of the appellee, and which, *ex æquo et bono*, the appellant ought not to retain. We have seen that no agreement giving the appellant this money was proven.

No reason is perceived why the appellee should not recover it, for which purpose assumpsit for money had and received is the appropriate remedy. *Taylor v. Taylor*, 20 Ill. 650.

As the owners of these animals were engaged in a common undertaking, the design of which was to secure a sum of money, offered for the display of all the animals together, they are not to be classed as strangers in the execution or completion of the enterprise. They were in privity with each other, and a direct promise to pay would not be neces-

sary to enable either to recover from another money received by the latter as the share of the former in the premium money.

Appellee became the owner of the mare and colt by transfer from her husband, not in writing and recorded, as required by Sec. 9, Chap. 68 of the Revised Statutes, for which reason appellant contends that appellee has no right of recovery.

Transfers of personal property between husband and wife are valid under the statute, though not in writing, except as against the "rights and interests of third persons."

The appellant has and had no right or interest in the property to be affected by the transfer, and as to him the statute has no application.

It is strenuously insisted that the court received incompetent testimony, and a reversal is asked for that reason. Without conceding that this criticism upon this action of the court is correct, it is sufficient to say, we think there is abundant evidence in the record to support the finding and judgment of the court, if all that is objected to as improper be rejected, and no doubt this was the view of the trial judge.

When a cause is tried by the court the presumption is that only proper evidence was considered, and, in such case, the admission of improper evidence does not warrant a reversal if there is enough beyond that to support the judgment. *Mer. Des. Trans. Co. v. Joesting et al.*, 89 Ill. 152.

Finding no error, the judgment is affirmed.

Brand v. Lock.

1. *Jury—Questions of Fact.*—Where a matter in controversy involves operations on the Chicago Board of Trade, and the defense was that they were illegal transactions because of a mutual understanding that the operations were mere speculation in the fluctuations of the market, etc., and the evidence was conflicting, the jury might have found either way, but having found for the plaintiff, their verdict was not disturbed.

Brand v. Lock.

Memorandum.—Action for money advanced. Appeal from the County Court of Vermilion County; the Hon. JOHN G. THOMPSON, County Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

APPELLEE'S STATEMENT OF THE CASE.

This suit was brought to recover \$212.75 advanced by appellee for appellant at his request. The declaration was on the common counts. It appears that appellee was requested by appellant to advance this sum to Lamson Bros. & Co. of Chicago, whose agent appellee was and is. Brand, the appellant, owed Lamson Bros. & Co. this amount of money on two deals, namely, 5,000 bushels July wheat sold April 6th, and 5,000 bushels sold April 10th. In these transactions appellee acted as the agent of Lamson Bros. It was the intention of appellee that appellant should deliver the actual commodity, and the only option that appellant had in the matter was as to the time of delivery, he having the entire month of July in which to deliver. It appears that the appellant became alarmed and closed out the deal of his own motion before the time for delivery. This he was given the privilege to do. On these two deals there was a loss of \$212.75, to the appellant. He told appellee to advance this amount for him and he would repay him on the 15th, and then afterward told him that he could not repay him until after harvest. This the appellee did as a mere accommodation to appellant, who afterward concluded that he would not pay at all, he claiming that the contract was illegal.

APPELLANT'S BRIEF.

If these sales and purchases were illegal, and appellee was a party thereto, or had knowledge of such fraud or illegality, then any money paid out by him in the furtherance or performance thereof, or any commissions earned, creates no valid obligations that can be enforced by him. An agent can never recover compensation for services performed in an illegal transaction, or in one against public policy. Story on Agency, Sec. 330-344.

If the contracts of sale or purchase were illegal, the appellee can not recover for money advanced in furtherance thereof, or for losses paid by him, for account of appellant. *Tenney v. Foote*, 4 Brad. 594; *Ibid v. Ibid*, 95 Ill. 99; *Coffman v. Young*, 20 Ill. App. 76; *Pearce v. Foote*, 113 Ill. 228.

W. J. CALHOUN, attorney for plaintiff.

APPELLEE'S BRIEF.

The defense of an illegal consideration is an affirmative one and the burden of proving it is upon the defendant. *Pixley et al. v. Boynton et al.*, 79 Ill. 351; *Erwin v. Williar*, 110 U. S. 499; *Logan v. Brown*, 81 Ill. 415.

Nor does the fact that the contract authorized the seller to exact margins as security make the contract illegal. *Corbett v. Underwood*, 83 Ill. 324.

FRANK LINDLEY and G. W. SALMANS, attorneys for appellee.

OPINION BY THE COURT.

The appellee, a grain commission broker, recovered a judgment against the appellant for \$212.75, on account of moneys advanced in certain operations on the Chicago Board of Trade. The defense was, that the transactions were illegal, because there was a mutual understanding that no grain was to be delivered or received, and that in every instance, the deal was a mere speculation in the market fluctuations, without any intention on either side to receive or deliver the commodity, or any part thereof. On this point the evidence was conflicting. The jury might have found either way.

They chose to credit the evidence offered by the plaintiff, and we find no sufficient reason to say that the verdict should be set aside for want of proof to support it.

It was mainly a question of good faith, for all the deals purported to be actual contracts for the purchase and

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delivery of grain. It is certainly not impossible that these transactions were what they seemed to be.

No complaint is made of the rulings of the court during the trial in reference to the admission of evidence or the giving of instructions. Let the judgment be affirmed.

Daniels v. Thompson.

1. *Contracts of Sale—Possession.*—A contract of sale which contains a provision authorizing the vendor to resume the possession of property placed in the possession of the vendee upon the latter's failure to make payments set forth, or in case the property should be levied upon by virtue of any writ, etc., not acknowledged and recorded as required by the chattel mortgage act, is valid between the parties, but invalid as to judgment creditors.

2. *Justice of the Peace—Docket Entries—Signatures, etc.*—It is not essential that the signature of a justice of the peace should be appended as a verification of his docket.

Memorandum.—Action of replevin. Justification under legal process. Appeal from the County Court of Vermilion County; the Hon. JOHN G. THOMPSON, County Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

The opinion of the court states the case.

APPELLANT'S BRIEF.

Appellee was seeking to justify, as an officer, under a writ of attachment. It was incumbent on him to show that he was an officer *de jure*. Schlencker v. Risley, 3 Scam. 484; Outhouse v. Allen, 72 Ill. 529; People v. Webber, 89 Ill. 347; Gilligan v. Stevens, 4 Brad. 401; Vaughn v. Owens, 21 Ill. App. 250. He must further show, where the goods are claimed by a third party, a writ regular on its face, based and issued upon a proper affidavit and bond, or where the same has passed into judgment, a writ based on a judgment valid on its face. Johnson v. Holloway, 82 Ill. 334. A proceeding by attachment is in derogation of common law and one

seeking its benefits must bring himself strictly within the statute. If he does not the proceedings may be attacked collaterally. *Haywood v. Collins*, 60 Ill. 328; *Waples on Attachment*, page 321, Sec. 4.

J. F. BUCKNER and H. M. STEELY, attorneys for appellant.

APPELLEE'S BRIEF.

It is urged that judgment in the attachment case was not signed by the justice of the peace. The law does not require the justice to sign judgments in his docket to make them valid. *Starr & Curtis' Statutes*, Chap. 79; *Lancaster v. Lane*, 19 Ill. 242.

We do not think it necessary for appellee to show his commission as constable, as a court is presumed to know all public officers in civil affairs within its jurisdiction and will take judicial notice of all civil officers in the county in which it holds its sittings. *Thielmann et al. v. Burg*, 73 Ill. 293; *Stout v. Slattery*, 12 Ill. 162; *Dyer v. Flint*, 21 Ill. 80; *Thompson v. Haskell*, 21 Ill. 215; *Brush v. Lemma*, 77 Ill. 496.

It is urged by appellant that the attachment proceedings were irregular and void, without jurisdiction, because of the irregularity of the affidavit and bond therein, which the court permitted to be amended by filing sufficient affidavit and bond before judgment, which cured the irregularity in that respect. Amendments are allowed in attachment proceedings as in other cases. *Starr & Curtis' Statutes*, Chap. 11; *Beecher v. James*, 2 Scam. 462; *Lea v. Vail*, 2 Scam. 474; *Roberts v. Dunn*, 71 Ill. 46; *Chapman v. Stuckey*, 22 Ill. App. 33.

The written contract of sale between appellant and Debelt was a conditional sale. It being a sale on condition that the vendor should have a lien for the price of the goods sold, accompanied by a delivery of possession, it is fraudulent and void as to creditors, when not recorded. *McCormick v. Hadden*, 37 Ill. 370; *Jennings v. Gage*, 13 Ill. 611; *Brundage v. Camp*, 21 Ill. 330; *Thompson v. Yeck*, 21 Ill.

73; Ketchum v. Watson, 24 Ill. 591; Murch v. Wright, 46 Ill. 437; Lucas v. Campbell, 88 Ill. 447.

MABIN & SMITH, attorneys for appellee.

OPINION BY THE COURT.

This was an action of replevin begun before a justice of the peace and removed by appeal to the County Court where, on a trial by jury, the issues were found for defendant, and judgment was entered accordingly, from which the plaintiff prosecutes an appeal to this court.

The defendant justified the taking as a constable, by writ of attachment against one Debelt, in whose possession the goods were found.

The plaintiff claimed that the goods belonged to him originally, though he had placed them in possession of Debelt under a written contract which contained a provision authorizing him to resume the possession upon failure of Debelt to make certain payments therein set forth, or in case the same should be levied upon by virtue of any writ, etc.

This contract was really a sale of the goods on credit, and was designed to secure a lien to the vendor for the unpaid purchase money.

It was not acknowledged or recorded as required by the chattel mortgage act, and while it was perhaps valid for the purpose designed as between the parties, it was invalid as against a judgment creditor. Murch v. Wright, 46 Ill. 487; Lucas v. Campbell, 88 Ill. 447.

It is urged by appellant that the court erred in permitting the appellee to testify that he was a constable and was acting as such. The testimony was objected to on the ground that the official character of the officer should be proved by his commission, but the objection was overruled. To this ruling no exception was saved at the time, nor was the point made on the motion for new trial. It can not, therefore, be considered now.

It is urged, also, that the court erred in allowing the de-

fendant to read to the jury the docket of the justice in the attachment case because it was not signed by the justice of the peace; and the affidavit and bond in the same case because they were originally imperfect.

It is not essential that the signature of the justice should be appended as a verification of his docket, and it appears that the bond and affidavit were amended before the judgment was entered. So that there was really no defect in either the docket or these papers, and if it were competent in this form of action to go behind a writ regular on its face under which the officer justifies as a defense, there is no valid objection to the jurisdiction in the present instance.

Assuming, as the defendant did, that it was incumbent upon him to sustain his action under the writ, by showing valid preceding steps, it is clear that he did so, and the plaintiff can not complain of the action of the court in this regard.

Questions of fact arising in the case need not be discussed, as we think the verdict is sufficiently supported by the proof. Whatever there was of conflict was for the jury to determine, and we can not say their conclusion is erroneous.

Some objection is urged as to the action of the court in giving an instruction asked for the defendant, and in refusing the third and fourth asked by the plaintiff.

As to the former, it is answered by what we have already said in reference to the legal effect and character of the written contract; and as to the latter, by what has been said as to the bond and affidavit and the justice's docket in the attachment case.

The judgment will be affirmed.

Chicago & Alton R. R. Co. v. Means.

1. *Verdicts—Special Findings and General Verdict.*—Where, in an action for personal injuries occasioned by a fall which the plaintiff received while a passenger on a railroad train and from which she was endeavoring to alight at a station on the road, the plaintiff relied upon, as the

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ground of her right of recovering, the failure of the company to stop the train a sufficient length of time to enable her to alight in safety, and the jury upon a special interrogatory submitted to them found that the train did stop a reasonable time at the station, *it was held* that, notwithstanding a general verdict for the plaintiff, a judgment could not be sustained under the declaration.

2. *Verdict against the greater weight of the evidence.*—Where in an action for personal injuries, caused by the sudden stopping of a train upon which the plaintiff was a passenger, the allegations of the declaration were supported by the testimony of the plaintiff and her niece, and directly contradicted by testimony of the conductor, engineer and fireman of the train, and also by two other persons who were passengers and in the same coach with the plaintiff at the time she received the injury complained of, *it was held* that the jury was not warranted in finding that the injury was caused by the sudden and improper stopping of the train.

Memorandum.— Action for personal injuries.¹ Appeal from the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Circuit Judge. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

APPELLANT'S STATEMENT OF THE FACTS.

Elizabeth Means, a lady past seventy years of age, together with her niece, about forty-five years of age, on the 24th of September, 1890, became passengers on one of the trains of the Chicago & Alton road at Springfield, Ill., to go to Elkhart, in Logan County.

The train left Springfield about half-past 8 o'clock in the evening and would arrive in Elkhart a little after 9 o'clock. The ladies were seated three or four seats from the door of the car. When the train was approaching the station at Elkhart, and after the speed of the train had begun to slow down for the station, the brakeman announced the station of Elkhart, and took the large valise of Mrs. Means and carried it out on the steps of the car. Mrs. Means' niece having followed the brakeman out of the car, Mrs. Means arose from her seat while the car was still in motion and walked to the door. When the train came to a stop Mrs. Means fell backward in the aisle of the car and received an injury to her hip. The verdict of the jury was for the plaintiff, and damages assessed at \$1,400.

APPELLANT'S BRIEF.

A passenger who unnecessarily exposes herself to danger by going to a place of danger, as attempting to leave a moving train, where the act contributed to an injury which she would otherwise have escaped, can not recover. *Illinois Central v. Green*, 81 Ill. 24; *Chicago & Alton Ry. Co. v. Becker*, 76 Ill. 31; 2 *Redfield on Railways*, 224; *C. & N. W. R. R. Co. v. Sweeney*, 52 Ill. 330; *C. R. I. & P. R. R. Co. v. Bell, Admr.*, 70 Ill. 103; *C., B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 511; *Pittsburg & Connellsville Ry. Co. v. Andrews*, 39 Md. 329; *Indianapolis Ry. Co. v. Rutherford*, 29 Ind. 82; *Chicago & Alton v. Fisher*, 31 Ill. App. 36; *Same v. Pillsbury*, 123 Ill. 21.

E. D. BLINN, attorney for appellant.

APPELLEE'S BRIEF.

A carrier is liable for injuries to passengers in its cars, caused by a sudden jolting of the car in starting or coming to a stop and in such cases it is for the jury to say whether or not the plaintiff was contributorily negligent in rising from the seat before the train stopped. *Am. & Eng. Ency. of Law*, Vol. 2, page 765, and authorities cited; *Phillips v. Rensselaer & S. R. R. Co.*, 57 Barb. 651; *Wylde v. Northern R. R. Co.*, 53 N. Y. 161.

Whether arising and attempting to alight while a train is in motion is such contributory negligence as will bar a recovery, is under all circumstances of the case a question of fact for the jury. *Chicago & Alton R. R. Co. v. Bonifield*, 104 Ill. 223; *L. E. & W. R. R. Co. v. Morain*, 36 Ill. App. 632; *Illinois Central R. R. Co. v. Haskins*, 115 Ill. 300; *Chicago & N. W. R. R. Co. v. Traves*, 33 Ill. App. 307; *Doss v. M., K. & T. R. R. Co.*, 59 Mo. 27; *Wyatt v. Citizens' R. R. Co.*, 55 Mo. 485; *Kansas & G., S. & L. R. R. Co. v. Dorough* (Supreme Court Texas), 10 S. W. Rep. 712; *Louisville, etc., R. R. Co. v. Crunk*, 119 Ind. 542; *Bucher v. N. Y. Central Ry. Co.*, 98 N. Y. 128; *Penn. Ry. Co. v. Kilgore*, 32 Penn. St. 292; *Waller v. Hannibal Ry. Co.*, 83 Mo. 608;

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Nance v. Carolina, etc., Ry. Co., 94 N. C. 619; Georgia Ry. Co. v. McCurdy, 45 Ga. 288.

Whether it is negligence to alight from a train while in motion, is a question of fact to be decided by a jury under all the circumstances, and not of law for the court. Chicago & Alton R. R. Co. v. Bonifield, 104 Ill. 223; Pennsylvania Co. v. Frana, 112 Ill. 398; Pennsylvania Co. v. Conlan, 101 Id. 94; Indianapolis & St. Louis R. R. Co. v. Morgenstern, 106 Id. 220.

It is not negligence *per se* to attempt to alight from a moving train. Louisville & Nashville R. R. Co. v. Crunk, 119 Ind. 542; N. Y. Phila. & Norfolk Ry. Co. v. Coulbourn, 69 Md. 360; Doss v. M., K. & T. R. R. Co., 59 Mo. 27; Penn. Ry. Co. v. Kilgore, 32 Penn. St. 292; Railroad Co. v. Murphy, 46 Texas, 356; Thompson on Trials, Vol. 2, Sec. 1684; 2 Wood's Railway Law, 1130; Thompson on Carriers, 227, 267; Beach on Contributory Negligence, 157.

BEACH & HODNETT, attorneys for appellee.

OPINION OF THE COURT, *The Hon. Carroll C. Boggs, Judge.*

This is an appeal from a judgment in favor of the appellee in the sum of \$1,400 as damages for personal injuries occasioned by a fall which she received while a passenger upon appellant's train from which she was intending and endeavoring to alight at Elkhart, a station on appellant's road.

The alleged failure of the appellant to stop the train at the station a sufficient length of time to enable the appellee to alight safely is relied upon as the ground of the right of recovery under the first and second counts of the declaration.

The jury in answer to the second special question propounded to them, found that the train did stop a reasonable time at the station. Therefore the judgment can not rest upon either of these counts. The declaration contains three other counts all substantially the same; the allegations of each being that the car in which the appellee was a passen-

ger was by reason of the negligence of the servants of the appellant company, in stopping and handling the train upon its arrival at the station of Elkhart, suddenly and violently stopped, jerked, jarred and jolted and caused to recoil, whereby the appellee, when attempting, on invitation of a servant of the appellant, to alight, was thrown with great force and violence upon the floor of the car and thereby severely injured, bruised and wounded, etc., etc.

The allegations of these counts find some support in the testimony of the appellee, but the only positive testimony that the train was stopped suddenly and violently, is that of Elizabeth Draper, a niece of the appellee, who was upon the platform at the station. In this respect both are, however, directly contradicted by the testimony of the conductor, the engineer and the brakeman of the train, and also by Rachel Rosenthal and Albert Jacobs, both of whom were passengers and in the same coach with the appellee at the time she received the fall.

Rachel Rosenthal testified that she had traveled frequently on this road and other roads, and that the stop made by the train at the time in question was not different from the ordinary stops nor in any way unusual. That she (the witness) was not thrown forward nor backward nor in any way affected by it.

Mr. Jacobs testified that he saw the appellant in the car and saw her fall; that the train stopped as usual and in such a manner as not to jolt, jar or affect him in any way. The allegation that the train stopped suddenly and violently is not supported by the evidence, but is against the greater weight of the testimony. It is not complained that any employe of the appellant was incompetent to perform his duties and the proof amply shows that the train was well equipped with the best and safest appliances for stopping and controlling trains.

The appellee at the time was of the age of seventy years. She occupied a chair some four or five seats distant from the door of the car and had with her a valise.

She was accompanied by her niece, a lady of about forty

years of age, who occupied a seat near the door. Both intended to alight at Elkhart, where another niece of the appellee, whose testimony we have referred to, was awaiting them. The niece who was in the car with the appellee, was not produced as a witness. The appellee's account of the occurrence is as follows: "I set my valise on the seat with me. When they called the name of the station at Elkhart, when the train was kinder slowing up like, the conductor or porter, I don't know which, came along and picked up my valise. I told him not to take them until the train stopped, and they started on with it, and after a while, my niece got up and went out. The porter, or conductor, with my valise, went out of my sight; my niece went on out, and I started to go out, and the train was kinder slowing up like; I kind of held on to the seats until I thought I could reach the door. Just as I let go of the seat to reach the door, the cars came together, and I fell backward on the floor, between the seats."

Upon cross-examination she stated that "she knew the cars was in motion when she left her seat, and she had about got to the door when the car stopped and she fell backward. That she was not very active, that one of her age could not be expected to be, but that she got about pretty well." Thus it is seen that the attempt of the appellee to reach the door while the train was in motion, directly contributed to, if it was not the sole cause of, the fall, and of the consequent injuries. While passing along the aisle she supported herself against the motion of the train by clinging to the arms of the seats until she thought she could let go and maintain an upright position by her own strength, long enough to reach the door. Just as she did let go of the seat, the train stopped, and she fell; a result quite likely to occur, even had she been a much younger and more active person. Her acts, when her age is considered, seem to us to have been very imprudent. Was she invited to take the course she did? The appellee's counsel urge that she was invited by an employe of the company to attempt to alight while the train was in motion. While

the train was in motion, the brakeman called the name of the station at which she was to alight, but she remained in her seat, and it is not claimed that she understood that it was her duty, or that she was expected or invited to arise when or because the name of the station was called. It was the duty of the appellant to give passengers reasonable notice of the approach of the train to the station, in order that those who were to alight there might be advised and be ready to leave the train when it came to a stop. *Dawson v. L. & N. R. R.*, 11 Amer. and Eng. R. R. Cases, 134.

The brakeman, while the train was in motion, passed through the car and took valises belonging to the appellee and others who intended to leave the car, and carried them out upon the platform.

Counsel for appellee, who have furnished us with a very interesting, able and exhaustive brief and argument, suggest that the act of the brakeman in taking the valise of the appellee ought reasonably be construed as an invitation to her to follow him out of the car.

As to this it is sufficient to say that the appellee did not so receive it. Her testimony is: "The conductor or porter came along and picked up my valise; I told him not to take my valise until the train stopped, but he went on with it. After a while my niece got up and went out. I thought I must go, and I started to go out," etc. The action of the niece seems to have been the real cause of the attempt of the appellee to leave the train.

In our opinion the jury were not warranted in finding that the appellee was injured by reason of a sudden and improper stopping of the train, as charged in the declaration, nor do we think it sufficiently shown that in attempting to leave the train while it was in motion, the appellee was acting as upon the invitation of a servant of the appellant.

For the reasons indicated the judgment must be reversed and the cause remanded.

Gillett v. Taylor.

Gillett v. Taylor.

1. *Practice—Authentication of Records.*—A record of the commissioners of highways offered in evidence, for the purpose of showing authority for digging a ditch in the highway, which is not authenticated by the signature of the president of the board as required by the statute, is not admissible.

2. *Record of Proceedings—Recitals of Former Proceedings.*—When a record of an order relied upon contains a mere recital that upon a former occasion certain proceedings were had, and when that occasion was and who was present not appearing, *it was held* insufficient.

Memorandum.—Trespass for filling a ditch. Appeal from a judgment for the defendant rendered by the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 17, 1892.

STATEMENT OF THE CASE.

The plaintiff offered to introduce in evidence a record, identified by Mr. Davis, town clerk, under date of July 25, 1891, as the record of the commissioners of highways of Elkhart township, as follows:

“July 25, 1891, present, Henry Ostermeier, Robert Turley; absent, C. Q. Taylor.

“Met in regular meeting and they talked the matter over concerning John P. Gillett cleaning out the open ditch along the side of the road running from Elkhart to Mt. Pulaski, on the north side of section 16 in said Elkhart township, and there agreed that they had given their consent for said John P. Gillett to open up or clean out said open ditch for the purpose of an outlet for his tile drain from his ponds in pasture.

Attest: WM. H. DAVIS,
Clerk of the Board.”

To the introduction of which the defendant objected, and the court sustained the objection. The plaintiff appealed.

APPELLANT'S BRIEF.

Technical precision in matters of form can not be regarded in entries of clerks of commissioners of highways. County Court of Madison Co. v. Rutz, 63 Ill. 65; Bliss v. Harris, 70 Ill. 343; Brennan v. Shinkle, 89 Ill. 604.

The statute does not make it essential to the validity of the record that the president should sign it.

E. D. BLINN, attorney for appellant.

APPELLEE'S BRIEF.

No official business can be transacted by highway commissioners except at a regular or special meeting of the board. Section 10, Roads and Bridges Act; Chaplin v. Highway Commissioners, 129 Ill. 651.

License to flow land must be in writing. Johnson et al. v. Rea, 12 Brad. 331; Stoddard v. Filger, 21 Ill. App. 560; Woodward v. Seely, 11 Ill. 157; Tanner v. Volentine, 75 Ill. 624.

The highway commissioners had no power to grant away a part of the public highway to drain appellant's land. Johnson v. Rea, 12 Brad. 336; P., Ft. W. & C. R. R. Co. v. Rich, 101 Ill. 157.

To maintain trespass the plaintiff must have possession. Dean v. Comstock, 32 Ill. 173; St. Louis, Vandalia & Terre Haute R. R. Co. v. Town of Summit, 3 Brad. 155; Cook v. Foster, 2 Gilm. 655; McCormick v. Huse, 66 Ill. 315.

If appellant acted as the agent for the highway commissioners in digging the ditch, he can not maintain this suit. 1 Chitty, Pl. 6; Gunn v. Cantine, 10 Johns. 388.

The right to dig and maintain such a ditch, is such a right and interest in the land that it would have to be created by deed, and could not be given by parol. It is an easement, and must be governed by the law bearing upon the conveyance of such rights. Woodward v. Seely, 11 Ill. 157; Tanner v. Volentine, 75 Ill. 624; Kuhlman v. Hecht, 77 Ill. 570; Forbes v. Balenseifer, 74 Ill. 183; Kamphouse v. Gaffner, 73 Ill. 454; St. L. Stock Yards v. Wiggins Ferry Co., 102 Ill. 520.

BEACH & HODNETT, attorneys for appellee.

OPINION BY THE COURT.

Appellant sued appellee in trespass for filling up a cer-

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tain ditch which appellant had opened up in the highway. The appellee was one of the highway commissioners and had been placed in charge of the highway where this ditch was, and being of the opinion that it was not properly there, he caused it to be filled. Thereupon appellant caused it to be again opened, and in this suit he sought to recover the expense of reopening the ditch. It appears that appellant, being the owner of certain lands near the highway, had laid a tile drain for the purpose of draining his land into the highway, but he did not own the lands on either side of the highway at the point where the ditch was opened. There was a tile drain then in the highway; but it was too small to carry off the water from appellant's drain. He sought to prove that he had lawful authority from two of the commissioners to dig the ditch, and that he had such an ownership or possessory right therein as would enable him to maintain trespass for an injury to the same. We do not care to discuss the question whether he had, according to his own claim, such an interest as would be necessary to support the action.

The Circuit Court excluded the record evidence which he sought to introduce to show his authority for digging the ditch, and this necessarily prevented him from recovering. He now assigns error upon this ruling of the court.

The record thus offered was not authenticated by the signature of the president of the board, as the statute requires, and was not admissible for that reason.

Again, it does not appear that an order was then made authorizing the ditch to be dug, but there is merely a recital that on a former occasion consent had been given to that effect.

When that occasion was and who was present does not appear.

It may be that this was intended as an authority then conferred to make the ditch, but the language employed is not sufficient for this purpose.

After this record had been excluded the plaintiff sought to prove a verbal permission from two of the commissioners, but this was properly excluded.

We find it unnecessary to discuss the question as to the power of the commissioners to grant such authority as here contended for, it being sufficient for the present purpose that no proper evidence was offered to show that the authority had been granted. *The People, etc., v. Madison Co.*, 125 Ill. 334. Judgment affirmed.

49	406
67	164
48	406
68	334
48	406
99	466

Walker Paint Co. v. Ruggles.

1. *Proof of Corporate Existence.*—It is error to instruct the jury that before the plaintiff, a corporation, could recover, it was necessary to produce its charter, showing its authority to exercise the powers of a corporation, when it was shown by the proofs that the defendant had repeatedly recognized the corporate existence of the plaintiff, in reference to the transaction in question.

Memorandum.—Assumpsit for balance due on account. Appeal from a judgment for the defendant rendered by the County Court of Cass County; the Hon. HENRY PHILLIPS, County Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 17, 1892.

The opinion of the court states the facts.

Instruction referred to in the opinion of the court:

The court instructs the jury, for the defendant, that before they can find that plaintiff is a corporation, the plaintiff must produce its charter, showing its authority to exercise its powers and privileges as a corporation; and unless this appears from the evidence, the jury must find for the defendant.

APPELLANT'S BRIEF.

Before justices and on appeal from their judgments, pleadings are *ore tenus*, but the plaintiff must state his cause of action and the defendant his defense, before the trial entered upon. *Bates v. Bulkley*, 2 Gilm. 389; *Webb v. Lasater*, 4 Scam. 543; *Brookbank v. Smith*, 2 Scam. 78; *Bedell v. Janney*, 4 Gilm. 193.

The primary object of pleading is to give the adversary notice of what he will be called upon to meet at the trial. Quincy Coal Co. v. Hood, 77 Ill. 68.

Nul tiel corporation must be specially pleaded. McIntire v. Preston, 5 Gilm. 48; Spangle v. Ind. & Ill. Cent. R. R. Co., 21 Ill. 276.

The object of a special plea is that all material facts constituting the defense shall be clearly and distinctly stated, so as to inform the adversary of what he has to meet on the trial. Parks v. Holmes, 22 Ill. 522.

In a suit by a corporation, unless the existence of the corporation is put in issue by the pleadings, it is admitted. Enos v. Chestnut, 88 Ill. 590.

The plea of *nul tiel* corporation is overcome when the corporation proves that it is known and transacts business under the corporate name in which the suit is assumed to be brought. Whether it is a corporation *de facto* or *de jure* does not matter when it sues to enforce a right. Osborn v. The People, 103 Ill. 224.

The execution of a note, mortgage, etc., to a corporation, as such, is sufficient *prima facie* evidence of its existence, and no further proof thereof is necessary, until such proof is rebutted. Brown v. Scottish A. M. Co., 110 Ill. 235; Hudson v. Green Hill Sem., 113 Ill. 618.

A *de facto* corporation is established by showing the existence of a charter, under which a corporation with the powers assumed might lawfully be created, and user by the party to the suit. Miami Powder Co. v. Hotchkiss, 17 Brad. 622.

Whether pleaded in writing, in a court of record, or *ore tenus* before a justice, or on appeal therefrom, a claim of set-off is a cross-action, in respect to which the claimant becomes plaintiff and the opposite party defendant. Pettis v. Westlake, 3 Scam. 535; Kelly v. Garrett, 1 Gilm. 649; Mineral Point R. R. Co. v. Keep, 22 Ill. 9; Ellis v. Cothran, 117 Ill. 458. And the original plaintiff having been made defendant by the claim of set-off, can not dismiss his action of his own accord. City of East St. Louis v.

Thomas, 9 Brad. 412. Nor take a non-suit without consent of his defendant. Western Union Tel. Co. v. Horack, Id. 309.

I. H. STANLEY and E. L. McDONALD, attorneys for appellant.

APPELLEE'S BRIEF.

This being a suit before a justice, all pleas are presumed to be pleaded, that is to say, the plea of *nul tiel corporation* was pleaded. "The defendant has a right to insist upon proof of all material facts necessary to a recovery, the same as if pleas were filed. It was necessary that the plaintiff should have proved its corporate existence." Town of Lewiston v. Proctor, 27 Ill. 416; Marsh v. Astoria Lodge, I. O. O. F., 27 Ill. 425.

In President, etc. v. Thompson, 20 Ill. 200, the court says that under this plea it is necessary to produce the charter and prove user. In Ramsey v. P., M. & F. Ins. Co., 55 Ill. 313, the court holds that a note given to a corporation can not be introduced in evidence until the charter has been produced, if the plea of *nul tiel corporation* is in. This case reviews the former decisions and affirms and approves McIntire v. Preston, 5 Gilm. 48.

A. A. LEEPER, attorney for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was a suit by the appellant against the appellee begun before a justice of the peace to recover a balance alleged to be due for goods sold.

The cause was removed by appeal to the County Court, where on a trial by jury the appellant was defeated. A motion for a new trial was overruled, and the record now comes by appeal to this court.

The appellant offered evidence tending to establish its demand against the appellee, but the court instructed the jury that before the plaintiff could recover, it was necessary

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to produce its charter showing its authority to exercise the powers of a corporation; otherwise the jury should find for the defendant. No evidence was offered by the defendant, and it is manifest that the verdict was due to this instruction.

It was shown by the proof that defendant had in writing repeatedly recognized the corporate existence of the plaintiff in reference to the transaction in question.

A part of the bill, amounting to the balance sued for, he ordered by a letter addressed to the corporation. By a telegram and by another letter he urged the speedy shipment of the goods. By a subsequent letter he requested the plaintiff to draw on him for \$65, and proposed to give his note for the balance of \$65.

In a later letter he inclosed a draft for \$65 and promised to remit the balance now in suit by the first of March next following; and by two letters written still later he stated his reason for wishing a discount, because of the unsatisfactory quality of the goods.

Having thus distinctly recognized the corporate capacity of the plaintiff, he has himself furnished sufficient evidence to overcome the plea of *null tiel corporation*, if such a plea can be supposed to be interposed. Such recognition is in all respects equivalent in its evidential force to the giving of a note or mortgage, or a deed, to the corporation, which acts have often been held enough to meet and overcome that plea.

There was proof also that the plaintiff was acting as a corporation—that it used a corporate seal, and that it had a charter, though the contents thereof did not appear.

Under such a condition of the proof we think it was error to give the instruction referred to. *Wood v. Kingston Coal Co.*, 48 Ill. 356; *Osborn v. People*, 103 Ill. 224; *Brown v. Scottish A. M. Co.*, 110 Ill. 235; *Hudson v. Green Hill Sem.*, 113 Ill. 618; *Miami P. Co. v. Hotchkiss*, 17 Brad. 622.

The judgment will be reversed and the cause remanded.

McKenzie v. Stretch.

1. *Burden of Proof.*—When the right of a plaintiff to recover rests upon an alleged contract, he must show by a preponderance of the evidence, a right of recovery under all the terms and conditions of the contract. This is equally true whether the plaintiff is seeking to prove a condition necessary to his right of recovery, or endeavoring to exclude a condition, which his adversary asserts as a part of the contract.

Memorandum.—Action upon a contract. Writ of error to reverse a judgment of the County Court of McLean County; the Hon. COLOSTIN D. MYERS, County Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 24, 1892.

Plaintiff's fifth instruction :

The court instructs the jury in behalf of the plaintiff that if the defendant claims that the contract was contingent upon the colt's matching one the defendant owned, then the defendant is bound to prove the contingency by a preponderance of the evidence.

PLAINTIFF'S BRIEF.

The burden of proof upon trial was upon Stretch, the plaintiff below, to prove that it was the only condition of said alleged contract, that the colt should stand up and suck. *Hebbard v. Haughian*, 70 N. Y. 54; *Taylor v. Spears*, 6 Ark. 381; *Central Bridge v. Butler*, 2 Gray, 130; *Ins. Co. v. Cole*, 4 Fla. 359; *Eastman v. Gould*, 63 N. H. 89; *Garretson v. Bitzer*, 57 Iowa, 469; *Zoller v. Morse*, 130 Mass. 267; *Homire v. Rodgers*, 74 Iowa, 395; *Simpson v. Davis*, 119 Mass. 269. .

FRANK R. HENDERSON and EZRA M. PRINCE, attorneys for plaintiff in error.

DEFENDANT'S BRIEF.

The burden of proof was on McKenzie to show that this colt was to be a match for his. He asserts this as a defense to this suit. He is holding the affirmative of this proposition and is bound to maintain it by a preponderance of the

MeKenzie v. Stretch.

evidence. The jury had no right to believe it was true until established by a preponderance of the evidence. *Burns v. Nichols et al.*, 89 Ill. 480.

WETLY, STERLING & McNULTA, attorneys for defendant in error.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The defendant in error began this action against the plaintiff in error before a justice of the peace to recover upon an alleged verbal contract that plaintiff in error would pay the defendant in error one hundred dollars for a colt to be bred upon a certain mare belonging to defendant in error by a stallion called the Moots horse, to be paid when such colt should stand up and suck. The action was defended upon two grounds: First. That the conversation between the parties relied upon to establish the contract was merely by way of a jest and in merriment, and not all in earnest as a contract. Second. That the alleged contract, whether a jest or not, was upon the condition that the colt to be purchased should be the match of another colt owned by the plaintiff in error.

The parties had a conversation when no other person was present, which plaintiff below claimed resulted in the contract sued upon.

Both parties testified as to the conversation. The plaintiff in error's version is that his proposition and the contract for the purchase of the colt were upon condition that it should prove when foaled to be a "match" for a colt then owned by him. This the defendant in error denied and asserted that the only condition was that the colt should live to "stand up and suck."

The court instructed the jury that the law cast upon plaintiff in error (who was the defendant below) the burden of showing by a preponderance of the evidence that the contract was conditional in the respect claimed by him. This we think was error. When the right of a plaintiff to recover rests upon an alleged contract, he must show by a preponderance of the evidence a right of recovery under all

the terms and conditions of the contract. This is equally true whether the plaintiff is seeking to prove a condition necessary to his right of recovery or endeavoring to exclude a condition which his adversary asserts was a part of the contract. Upon the question of what were the terms and conditions of the contract, the preponderance of evidence is required of the plaintiff.

He sues upon the contract, and to recover, must show by a preponderance of the evidence that under its terms and conditions he has the right to recover.

If the defendant claims that the contract was so conditioned as to relieve him from liability, and no proof of such condition appears in the testimony produced on behalf of the plaintiff, the burden of introducing testimony tending to establish the condition is upon the defendant—but to defeat the plaintiff he is not required to prove by a preponderance of evidence that such was the contract. When testimony is produced tending to establish the condition claimed by a defendant, the issue is as it was at the beginning of the trial. What are the terms and conditions of the contract?

Upon this issue the party seeking a judgment by the force and effect of the contract must produce a preponderance of the evidence. If the evidence as to one of the conditions is equally balanced, there can be no judgment against the defendant, if this condition would acquit him of liability. As to all the terms and conditions of the contract upon which the suit is brought, the burden of producing a preponderance of the proof is upon the plaintiff throughout the entire trial. *Powell v. Russell*, 13 Pick. (Mass.) 76; *Phipps v. Mahon*, 141 Mass. 471; 1 *Greenleaf's Evidence*, 15th Ed., Note *a*, Section 74.

The testimony upon the point in question was almost wholly that of the two contending parties. It was directly contradictory, and might have been regarded by the jury as equally balanced. The colts were not similar, much less matches. It was therefore important that the instructions should correctly and accurately state the rule of law applicable to the situation.

Halsey v. Stillman.

The instruction given cast the burden wrongfully, we think, upon the plaintiff in error.

It is urged that the cause has been three times tried, and that the defendant in error has succeeded upon each hearing.

We think a consideration of these verdicts makes more apparent the prejudicial effect of the instruction under consideration.

The first verdict was for \$50 and was wholly unwarranted by the evidence, because plaintiff should, according to his own evidence, recover \$100 or be defeated.

This verdict indicates that the jury were unable to agree upon the real question at issue. It was the result of the inability of the jury to determine from the proof what the contract was, and of a too common disposition of jurors to split the difference when unable to determine whether they really ought to give the plaintiff all that he claims, or nothing at all.

The second verdict was for \$12, a sum which has no connection whatever with the evidence, except that it was casually mentioned by the plaintiff below that he paid that sum for the season of the mare. This verdict, it is apparent to us, was agreed upon because the jury was unable to agree from the evidence as to the real right of the parties, but concluded that the defendant below ought to be willing to pay the sum named to be rid of further litigation.

The last verdict was for \$100, and we can not say but that it was produced by the erroneous instruction.

Judgment must therefore be reversed and the cause remanded.

Halsey v. Stillman.

1. *Slander—Imputation of Larceny—The Rule at Common Law.*—The rule of common law was that it was not actionable to say one stole what would be fixtures to real estate. The reason for the rule was that real estate could not be the subject of larceny. Sec. 175, Chap. 38, R. S. Ill., provides that if one, by trespass, with intent to steal, takes and

carries away anything which is parcel of the realty, he shall be guilty of larceny, the same as if the property taken were personal property. The reason for the common law rule no longer exists, and the rule itself fails with the reason upon which it is based.

2. *Repetition of Slanderous Words.*—While, in an action of slander, the plaintiff can not make out his case by proving words spoken after the commencement of the suit, yet it is always competent to prove a repetition of the words after the beginning of the suit for the purpose of showing malice and in aggravation of damages.

3. *Imputation of Larceny not always Actionable.*—One who has lost property by theft, or trespass, may, in good faith and without malice, recite the facts and circumstances connected with such loss, though the guilt of another is thereby indicated, without subjecting himself to an action of slander, if he expresses no opinion and makes or intimates no charge as to the guilt of another.

4. *New Trial.*—A new trial will not be granted upon the ground of newly discovered evidence where the evidence, if heard, would not be conclusive or decisive, but merely cumulative.

Memorandum.—Action for slander. Appeal from a judgment for \$650, in favor of the plaintiff, rendered by the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 24, 1892.

APPELLEE'S STATEMENT OF THE CASE.

Slanderous words were spoken by appellant of appellee, while appellee was assisting his father-in-law, Elias Brock, in the rebuilding of a division fence between the farms of Elias Brock and appellant. On the 21st of September, 1891, Elias Brock, A. W. Brock, Albert Overton, Samuel Hunter, George Dorman, and appellee, were all at work peaceably and quietly building a fence, when appellee of his own motion came out and provoked a quarrel with Elias Brock. Appellant forbade Brock from setting stakes on his side of the fence. Appellant said to Brock that he could lick any man over the fence, to which Brock replied that he had a man there that could or did lick him, to which the appellant replied, "Who, Stillman? the damn thief! he stole two screen doors off my house, and I can prove it." That was before appellee had said a word. Appellee then said, "Don't you call me a thief," to which appellant replied,

Halsey v. Stillman.

"You are a damn thief, and I can prove it; you stole two screen doors off my house."

APPELLANT'S BRIEF.

Appellant asked the court to instruct the jury that if appellant at the time of the speaking of the words which were claimed to be actionable, so modified the words or made such explanation as that the bystanders would understand that he did not intend to charge larceny, then the words would not be actionable. The refusal to give this instruction we think is error under the rule laid down in *Artieta v. Artieta*, 15 La. A. 48; *Hagan v. Hendry*, 18 Md. 177; *Lewis Hatch v. John S. Potter et ux.*, 2 Gil. 725; *Alexander Owen v. James McKean*, 14 Ill. 459; *Jesse Foval v. William R. Hallett*, 10 Brad. 265; *Benj. Miller v. William E. Johnson*, 79 Ill. 58; *Winchell v. Strong*, 17 Ill. 597.

The court permitted Linas Richards, C. W. Perkins and Fred Harpester to testify over appellant's objection to conversation with, and to words spoken by, appellant after the commencement of this suit. This was a palpable error, for which the case should be reversed. *Distin v. Ross*, 69 N. Y. 122; *Daly v. Byrne*, 77 N. Y. 182; *Meyer v. Bohlring*, 44 Ind. 238; *Alpen v. Merton*, 21 O. St. 536.

STEVENSON & EWING, counsel for appellant.

APPELLEE'S BRIEF.

Passion is never an excuse for a slander, and can only be received in mitigation of damages when the passion is excited by the plaintiff. *Miller v. Johnson*, 79 Ill. 59.

A plaintiff may, to prove malice, give evidence of a publication by the defendant made subsequently to the publication declared upon, when the subsequent publication is of a like import with that declared upon, or relating thereto. *Townshend on S. and L.*, Sec. 394; *Newell on Defamation*, S. and L., 331-332.

KERRICK, LUCAS & SPENCER, attorneys for appellee.

OPINION OF THE COURT, *The Hon. Carroll C. Boggs, Judge.*

This appeal seeks the reversal of a judgment in the sum of \$650 rendered against the appellant in an action for slander brought by the appellee. One of the allegations of the declaration is that the appellant said of the appellee, "He is a thief; he stole my screen doors;" and other allegations charged words imputing the guilt of larceny without qualification or explanation. These allegations are, we think, supported by the evidence.

The rule at common law was that it was not actionable to say one stole what would be fixtures to real estate. The reason for the rule was that real estate could not be the subject of larceny. Sec. 175, Chap. 38, R. S., provides, that if one by trespass with intent to steal takes and carries away anything which is parcel of the realty he shall be guilty of larceny, as if the property taken were personal property. The reason for the common law rule referred to, therefore, no longer exists, and the rule itself fails with the reason upon which it was based.

An action may be sustained upon words imputing to another the crime of larceny under the statute cited.

It is complained that the appellee was permitted to prove that the appellant spoke the slanderous words after the commencement of the suit. The appellee could not make his case by proving words spoken after he began his suit, nor did he attempt to do so. The proof establishes the speaking of the slanderous words, before and after the commencement of the suit. It is competent to prove a repetition of the words after the beginning of a suit for slander, and such repetition may be considered by the jury upon the question of malice and in aggravation of damages. *Stowell v. Beagle*, 79 Ill. 525.

The following instruction asked by the appellant was refused:

If you believe from the evidence that the plaintiff did take door screens off the house of the defendant, and that the defendant was compelled to send for them and take them back, and if you believe from the evidence that the words spoken by the defendant were with reference to the

taking of such screens, and that the said facts were explained at the time of the speaking of such words, so that the persons present could understand that the allusion was made to the taking of such screens, and that such circumstances did not show the plaintiff to be guilty of larceny, then the defendant was not guilty of charging the plaintiff with larceny in the sense of making him liable in an action of slander for the speaking of actionable words.

One who has lost property by either theft or trespass may, no doubt, in good faith and without malice, recite the facts and circumstances connected with such loss—though the guilt of another is thereby indicated—without subjecting himself to an action for slander, if he expresses no opinion and makes or intimates no charge as to the guilt of the other. In the case at bar there was evidence that the appellant, when reciting the facts concerning the screens, denounced the appellee as a “thief” and stated in express terms that he had stolen the screens. If he did so he could not be allowed to insist that only the details of the transaction as given by him should be considered, and that it should not be deemed that he imputed to the appellee the crime of larceny—though he did so in direct and explicit words—unless the facts and circumstances as stated by him were sufficient to establish, or at least induce in the minds of the hearers the belief that the appellee was in fact guilty. That the direct and unequivocal charge of guilt was made, and the taker of the screens denounced as a thief, can not be omitted from consideration.

There was proof of such charge and denunciation. The instruction wholly ignores this evidence and this view of the law, and was properly refused.

A new trial was asked because of newly discovered testimony. It seems, from the affidavits in support of this motion, that the appellee, prior to the trial of the slander suit, caused the appellant to be arrested and tried for an alleged assault, said to have been committed on the appellee at the time of the speaking of words about the taking of the screens.

At the trial of the appellant upon this charge of assault and battery, four of the witnesses who testified for the appellee in the slander suit, were witnesses, and gave testimony as to the same occurrence and conversation. The appellee insists that these witnesses, when testifying before the justice of the peace in the assault and battery case, did not state that the appellant called the appellee a thief, or charge that he had stolen his screens, as they did when testifying in the trial of the slander suit; that, in short, said witnesses changed their testimony, greatly to his surprise. In support of this appellant presented his affidavit and an affidavit of N. W. Braudica, who acted as his attorney before the justice.

The appellant was present at both trials and heard the witnesses testify on both occasions. It does not appear that he made the slightest effort to reproduce the testimony of these witnesses given before the justice, or that any questions were even propounded to the witnesses, or either of them, in the Circuit Court, as to their testimony upon the previous trial. No foundation was laid for the introduction of evidence as to their statements. The appellant could not thus sit silent and take the chances of a favorable verdict and reserve the right to demand another hearing if defeated.

The evidence, if heard, would not be conclusive or decisive, but merely cumulative, and not sufficient to warrant the vacation of the verdict and granting a new trial.

We do not regard the damages as excessive. The jury were warranted in believing that the appellant charged the appellee with a theft and denounced him as a thief, not only upon an occasion when he was angry, but also upon a subsequent time when he was not moved by the impulse of passion. The judgment must be and is affirmed.

48	418
145	253
48	418
55	631

Doll et al., Impleaded etc., v. The People, etc., use of County of Clark.

1. *Estoppel*—*Binding upon principal in a bond, binding upon his sureties.*—The principal in an official bond (in this case being the county

Doll v. The People.

treasurer) is estopped to deny the truth of his own reports and records. It is a part of his official duty to keep correct accounts and make correct reports. To secure the performance of this duty is one of the objects and conditions of his bond. He can not be heard to falsify his own official records, and whatever binds him in this respect, binds his sureties.

Memorandum.—Action of debt on the official bond of Aaron P. Cole, County Treasurer. Appeal from a judgment rendered by the Circuit Court of Clark County; the Hon. FERDINAND BOOKWALTER, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 24, 1892.

The opinion states the case.

APPELLANTS' BRIEF.

A surety upon an official bond is not liable for a defalcation occurring during a former term, much less during the term of a former treasurer, when he was not surety. The liability is upon the bond for the term in which the misappropriation occurred. *Stern v. People, etc.*, 96 Ill. 475; *Potter v. Trustees*, 11 Ill. App. 280; *Mechem on Public Officers*, 286-287.

The doctrine of the Gage case (*City of Chicago v. Gage*, 95 Ill. 593) is, we believe, opposed to the weight of authority in this country, in holding that the official reports, accounts and records, even where the officer was his own successor and the official accounts and records were made and kept as required by law, are conclusive upon his sureties.

That such official reports, accounts and records are *prima facie*, but not conclusive, is held by the courts of the United States, New York, New Jersey, Massachusetts, North Carolina, South Carolina, Alabama, Missouri, Texas, Nevada, Mississippi, Indiana, Arkansas, Nebraska and Wisconsin; *U. S. v. Boyd*, 5 How. 50; *Soule v. U. S.*, 100 U. S. 8; *Bissell v. Saxton*, 66 N. Y. 55; *Supervisors v. Bristol*, 99 N. Y. 316; *Freeholders v. Wilson*, 1 Harr. (N. J.) 117; *Hatch v. Attleborough*, 97 Mass. 533; *State v. Fullenwider*, 4 Ired. (Law) 364; *Treasurers v. Bates*, 2 Bailey, 381; *Coleman v. Pike*, 83 Ala. 326, 3 Am. St. Rep. 746 and note; *State v. Smith*, 26 Mo. 226; *Broad v. Paris*, 66 Texas, 119; *State v. Rhoades*, 6

Nev. 352; Mann v. Yazoo, 31 Miss. 574; Lowry v. State, 64 Ind. 421; State v. Newton, 33 Ark. 276; Van Sickel v. County of Buffalo, 13 Neb. 103; Vivian v. Otis, 24 Wis. 518.

That such official accounts and reports, made by an officer who was his own successor and in the manner prescribed by law, are conclusive upon sureties, has never been accepted by law, except in the four States of Virginia, Indiana, Illinois and Iowa. The doctrine originated in Virginia, in Baker v. Preston, 1 Gilmer, 235, which was decided by a special court organized to try a single case. It has been expressly repudiated in nearly every one of the cases above cited, and has been so far discredited and questioned in later Virginia cases as to be no longer regarded as authority. Munford v. Overseers, 2 Rand. (Va.) 313; Jacobs v. Hill, 2 Leigh (Va.) 393; Craddock v. Turner, 6 Leigh (Va.) 116; Crawford v. Turk, 24 Gratt. (Va.) 176.

Baker v. Preston was followed in Indiana in State v. Grammer, 29 Ind. 530, but this case and the doctrine has been subsequently overruled in Indiana. Lowry v. State, 64 Ind. 421; Ohning v. Evansville, 66 Ind. 59.

Subsequently to these decisions the legislature declared such settlements not conclusive. And it is said to be "evident that the legislature meant to do what the court has done—overturn the doctrine of estoppel as declared in State v. Grammer, 29 Ind. 530, and leave the officers' accounts open for investigation in cases of fraud or mistake." Heagy v. State, 85 Ind. 260, 262.

All law writers and reviewers seem to agree that the weight of authority and the true rule is that such official reports and accounts are only *prima facie*, against sureties. Mechem on Public officers, par. 289; Central Law Journal, Vol. 10, page 18; Murphree on Official Bonds, par. 591; Brandt on Suretyship, par. 522; also note to par. 467 where Morley v. Town of Metamora, 78 Ill. 394. is stated to be opposed in principle to the decided weight of authority. Bigelow on Estoppel, 5th ed., note 2, page 146.

GOLDEN & HAMMILL, attorneys for appellants.

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APPELLEES' BRIEF.

The ruling of the trial court was clearly right, and was in harmony with, and is fully sustained by, the following cases: Longan v. Taylor et al., 130 Ill. 412; City of Chicago v. Gage, 95 Ill. 593; Morley v. Metamora, 78 Ill. 394; Roper et al. v. Sangamon Lodge, 91 Ill. 518.

The sureties on an official bond can make no defense that the principal could not make. The measure of his responsibility is the measure of theirs. Boone Co. v. Jones, 2 N. W. Rep. 937; McCabe v. Raney, 32 Ind. 309; Seaver v. Young, 16 Vt. 658; Charles v. Hoskins, 14 Iowa, 471.

They are estopped to deny the records kept and statements made of their principal's accounts at the beginning of his term of office, which have been made a matter of record. Longan v. Taylor, 130 Ill. 412; City of Chicago v. Gage, 95 Ill. 593; Baker v. Preston, 1 Gilmer (Va.) 235.

In the case of Baker v. Preston, 1 Gilmer (Va.) 235, which was a suit against the treasurer and his sureties, the court said that "the books kept by the treasurer and reports made by him were conclusive evidence of the balances actually in the treasury at any given time, both against the treasurer and his sureties." The following cases decided by the Supreme Court of Illinois, hold the same doctrine: Longan v. Taylor, 130 Ill. 412; City of Chicago v. Gage, 95 Ill. 593; Morley v. Town of Metamora, 78 Ill. 394; Pinkstaff v. People, 59 Ill. 148; Roper v. Sangamon Lodge, 91 Ill. 518; Stern et al. v. People, 96 Ill. 475; Cawley v. People, 95 Ill. 249.

GRAHAM & TIBBS, attorneys for appellees.

T. L. ORNDORFF, state's attorney.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was an action of debt on the official bond of Aaron P. Cole as county treasurer of Clark county. The plaintiffs recovered a judgment for the penalty of the bond to be satisfied on payment of the damages, which were as-

sessed at \$5,081.71. The breach of official duty assigned in the declaration was a failure of the principal to pay over to his successor the amounts remaining in his hands at the end of his term belonging to the various funds of the county.

Sundry objections are urged to the ruling of the court in admitting and rejecting testimony, etc.; but the principal question in the case is whether the sureties can be allowed to falsify the reports made and records kept by the county treasurer, and show that he did not in fact receive from his predecessor in office, the moneys which by said reports and records he charged himself with. The amount so reported as received from his predecessor, Thomas W. Cole, who was his father, was much greater than his deficit, and if the sureties may show that it was not so received, then there was no deficit and no cause of action upon the bond in suit.

In most of the cases cited arising in this State, where the books and reports of the principal have been held conclusive in the sureties, the officer was his own successor. It was so in *Roper v. Sangamon Lodge* 91 Ill. 518; *Morley v. Town of Metamora*, 78 Ill. 394; *City of Chicago v. Gage*, 95 Ill. 593, and *Longan v. Taylor*, 130 Ill. 412, which may be regarded as typical cases.

Manifestly there are considerations applicable when the officer succeeds himself, which are not when he succeeds another.

Chief among these is the proposition, that, where one is his own successor, the money is presumed to be in his hands and the law transfers any balance to the second term. In the *Gage* case, *supra*, the Supreme Court discusses quite fully the reasons which should require the sureties to be held concluded by whatever concludes the principal, and cite many adjudged cases in support of the position there taken. It is unnecessary, therefore, to do more than refer to the very elaborate treatment of the subject to be found in that opinion. But there is one aspect of this case peculiar to it, and, as we think, the argument suggested thereby is of irresistible force. The predecessor of the principal defendant

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here had given his official bond, upon which he and his sureties were liable for his failure to pay over the money in his hands at the end of his term. It was of the highest importance to those sureties, and to the public, to know the actual condition of his cash account, and the truth as to the balance transferred by him to his successor, the present defendant.

If he was really a defaulter, the public had an interest in knowing the fact, so that prompt measures might be taken to enforce the liability of all parties on his bond, and it was no less important to the sureties to enable them to obtain protection as against him and to adjust their rights as to contribution among themselves.

If the default is concealed for four years many changes will occur, and it needs no argument to show that such concealment would furnish a serious ground of complaint by all parties, whether public or private, who may be affected by the fact of default. To allow the successor of the defaulter to cover up the delinquency by admitting that he had received the money and then, at the end of his term of four years, to avow it as a defense to an action on his bond, would be to enable him to shield a guilty official from prosecution and to perpetrate a gross fraud and entail great inconvenience and loss upon the public, and upon the sureties of the defaulter. Sound considerations of public policy forbid such a defense.

The principal in the bond is estopped to deny the truth of his own reports and records.

It is a part of his official duty to keep correct accounts and make correct reports, and to secure the performance of this duty, is one of the objects and conditions of the bond. He can not be heard to falsify his own official records, and whatever binds him in this respect should bind his sureties. The present case very forcibly illustrates the impolicy of allowing an incoming treasurer to cover up the default of his predecessor. The latter was the father of the former. The relation thus existing, no doubt, induced the alleged false record, the promise to make up the balance being

accepted instead of the cash. It is unnecessary to enlarge upon this feature of the case.

Therefore, upon the chief question involved, we are of opinion the ruling of the Circuit Court was right. It is not deemed necessary to consider and discuss in detail various minor points urged by appellants as to the admission of evidence; for, as we understand it, unless the proposed defense can be made, there is no doubt of liability to the extent established by the judgment. Affirmed.

Oliver, Administratrix, et al. v. Gill.

1. *Contracts—Enforcements, etc.*—It is for the courts to enforce contracts as parties make them, unless there is some unconscionable or illegal feature in them.

Memorandum.—Foreclosure proceeding. Writ of error to the Circuit Court of Sangamon County to reverse a decree rendered in that court: the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 24, 1892.

STATEMENT OF THE CASE BY THE COURT.

The Central Coal Company had for its officers and managers, Thos. M. Cochran, president, Alex. Nebinger, treasurer, and J. N. Reece, secretary, who were mainly the owners of the property. Geo. N. Brinkerhoff held, as trustee, the title to certain real estate for the benefit of Nebinger, Reece, and Mrs. Louisa M. Cochran, wife of Thos. Cochran, and himself. Said Brinkerhoff and Edward T. Oliver were partners and loan agents.

The coal company borrowed, on the 14th December, 1889, the sum of \$1,500, from Oliver, and in evidence of the debt gave him two notes of \$750 each, one due March 14, and the other April 16, 1890. To secure these notes Brinkerhoff, trustee, Nebinger, Reece and Mrs. Cochran gave a mortgage on the property held by Brinkerhoff in trust.

On the 31st December, 1889, the coal company borrowed of

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Brinkerhoff and Oliver \$500, on an unsecured note at sixty days with the understanding that the money should be repaid from a sum which the company was then negotiating for with Chas. W. Gill.

The coal company wished to borrow from Gill \$3,000 upon the security of the property held by Brinkerhoff as trustee, but Gill having learned of the lien held by Oliver, was unwilling to take the security subject to said prior lien, and required Oliver to release his claim, of which there was only the note for \$750, due April 16, 1890, the other having been paid.

The result of the negotiations was that on the 6th of February, 1890, the loan from Gill to the company was affected. Oliver deeded the land back to Brinkerhoff, and the latter conveyed it to Gill to secure him for the loan of \$3,000. As a part of the transaction, Gill, Brinkerhoff, Nebinger and Mrs. Cochrane executed and delivered to Oliver an agreement reciting that, whereas, this — day of February, 1890, Brinkerhoff, trustee, Nebinger and Mrs. Cochrane have executed and delivered to Gill, complainant, deed for their interest as determined by contract in tract of land known as "Woodside Subdivision No. 1," in consideration of \$3,000 loan, by which deed Gill is to receive one-half of proceeds of sales of lots from said tract, to be applied as received, to the discharge of said loan; and whereas, said parties and others owe E. T. Oliver \$750, balance of \$1,500 obligation; "Now, therefore, in consideration of the premises and of one dollar in hand paid, I, Charles W. Gill, hereby agree that one-half the proceeds of any and all lots sold out of the aforesaid tract of land shall be first applied to the payment of said \$750 so due the said E. T. Oliver, or such part thereof not otherwise paid or discharged by the parties above mentioned. Said E. T. Oliver shall execute and deliver to said Gill receipts for all payments made as aforesaid on said obligation. This agreement is made by virtue of the right vested in said Gill by the deed of conveyance aforesaid." Dated February 6, 1890, and signed by Brinkerhoff, trustee; Nebinger, Mrs. Cochrane and Charles W. Gill.

The \$500 debt of December 31, 1889, due Brinkerhoff and Oliver, was paid out of the money furnished by Gill.

This indebtedness to Gill, which was evidenced by a note for \$3,000, signed by Nebinger and Mrs. Cochrane, due February 4, 1891, not having been paid, and no lots having been sold out of the land held by Gill as security, the latter filed his bill in chancery, treating the said deed to him as a mortgage and asking for relief, etc., as a mortgagee. Nebinger, Brinkerhoff and the Cochranes were made parties and filed their answers, alleging, among other things, that by reason of the facts above stated, Oliver was entitled to a prior lien over Gill as to one-half of the premises to secure payment of the \$750 note which he still held.

Oliver was admitted as a party defendant on his application, and having answered the bill, filed his cross-bill, asking that he be allowed a first lien as to one-half the property for the payment of his claim. The cause was heard and a decree was entered, finding the amount due Gill for the principal and interest of his note and taxes paid, etc.; in default of which the premises were to be sold and proceeds applied in discharge of the indebtedness, and dismissing the cross-bill.

PLAINTIFFS' BRIEF.

Mortgages as between the parties are valid without acknowledgment. *Roane v. Baker*, 120 Ill. 309. Parol evidence is admissible to show the true character of a mortgage and for what purpose and what consideration it was given. 1 *Jones on Mortgages*, Sec. 384. Parol evidence is admissible to identify the debt intended to be secured. *Melvin v. Fellows*, 33 N. H. 401. A mortgage does not depend on the kind of indebtedness secured, the form in which the indebtedness exists being immaterial. 1 *Jones on Mortgages*, Sec. 264-5; *Workman v. Greening*, 115 Ill. 479. A mere change in the form of the evidence of the debt will not in any manner affect the lien created by a mortgage. *Citizens National Bank v. Dayton*, 116 Ill. 257. A new note was taken in this case. *Darst v. Bates*, 51 Ill.

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439. Original notes were taken up and new notes given in this case also. Equity only looks to the substance and not to mere form. A mere change in the form of debt does not satisfy a mortgage to secure it. *Flower v. Elwood*, 66 Ill. 438. When parties make a contract which lacks the formal requisites of a mortgage but is intended as a security for a debt, equity will give effect to their intention, and such instruments are called equitable mortgages. 1 Jones on Mortgages, Secs. 162-168, Chap. V.

CONKLING & GROUT, attorneys for plaintiffs in error.

DEFENDANTS' BRIEF.

The law is well settled that a promise to pay a debt out of a designated fund does not give an equitable lien upon the fund or operate as an equitable assignment thereof. *Rodgers v. Hosack's Executors*, 18 Wend. (N. Y.) 319; *Christmas v. Russell*, 14 Wall. (U. S.) 69; *Trist v. Child*, 21 Id. 441; *Williams v. Ingersoll*, 89 N. Y. 518; *Cook v. Black*, 54 Iowa, 693.

If there was improper evidence in the record, a court of chancery will not reverse for that reason, if there is enough competent evidence to sustain the decree. *Smith v. Long*, 106 Ill. 485.

PATTON & HAMILTON, solicitors for defendants in error.

OPINION BY THE COURT.

It is assigned as error that the cross-bill was dismissed and the prior lien therein set up was denied, and this presents the only question arising for our determination. It may be admitted that the obligations held by Oliver and Gill were really the debts of the coal company, but this does not seem to affect in any especial way the rights of the parties.

Oliver held a first lien to secure his debt, and in order that the company by its managing stockholder might obtain a loan from Gill, out of which the unsecured debt of \$500

to, Brinkerhoff and Oliver was to be paid, the latter released his security by deeding the land back to Brinkerhoff, and in place of it took the security expressed in the agreement signed by Gill and the other parties. No doubt it was expected that a considerable demand for lots would arise, and from the proceeds of sales of one-half of such lots, the balance due Oliver would be realized.

It is also probable that Gill supposed there would be enough derived from the enhanced value of the property, when sold in lots, to make him secure, after devoting one-half of the proceeds, as far as necessary, to the satisfaction of Oliver's claim; but no lots were sold, and the contingency provided for in the agreement has not happened. It is for the courts to enforce contracts as parties make them unless there is some unconscionable or illegal feature therein. Nothing of that sort appears.

The contract did not provide, in terms or by implication, that in case no lots were sold Oliver should have a first lien, or any lien, upon one-half of the property. Had his cross-bill prayed for a lien subordinate to that of Gill, perhaps he might have been relieved to that extent, but his assertion of a prior lien was unfounded, and properly rejected.

We deem it unnecessary to refer to the oral testimony, or to the arguments of counsel in detail. No doubt Oliver felt sufficient reason for changing his position, and no doubt Gill understood the extent of Oliver's lien under his mortgage; but he did not choose to take a lien subject to the mortgage, and as between Gill and Oliver, that mortgage was extinguished, and it was so intended. It is not to be supposed that either party expected Oliver to realize anything until Gill was fully paid, except from lot sales. This was the fund expressly provided, from which, and from which only, could Oliver receive anything on his claim. This fund failed, and with it Oliver's security as against Gill. We are of the opinion the decree should be affirmed.

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48	429
48	434
145s	620

1. *Homestead and Loan Associations—Withdrawal of Stock—Construction of Statute.*—Section 6 of the Homestead and Loan Association Act of this State, R. S. Ch. 32, Par. 73, providing that any stockholder wishing to withdraw from the said corporation shall have power to do so by giving thirty days notice of his intention to withdraw and shall be entitled to receive the amount paid in by him and such interest thereon or such proportion of the profits as the by-laws may determine, less all fines and other charges, relates only to corporations formed under the laws of this State, but will control the remedy of resident shareholder in non-resident corporations doing business in this State, the by-laws of such foreign corporations to the contrary notwithstanding.

2. *Foreign Corporations—Resident Shareholders.*—Under paragraph 26, R. S., Ch. 32, providing that foreign corporations and officers and agents thereof doing business in this State shall be subject to all the liabilities, restrictions and duties that may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers, a foreign homestead and loan association, doing business in this State, will be subject to the laws of this State, and a resident shareholder therein will be entitled to withdraw his stock and to sue for and recover payments made by him, upon giving thirty days notice, etc., as required by section 6, R. S., Chap. 32, notwithstanding the provisions of the charter and by-laws of such foreign corporation to the contrary.

Memorandum.—Action to recover amounts paid by a stockholder in a benefit association. Appeal from a judgment of \$30 for plaintiff, rendered by the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 24, 1892.

The opinion of the court states the case.

APPELLANT'S BRIEF.

Section 6 of the Illinois act of 1879, only applies to organizations under that act and not to appellant acting under a special charter, and a contract applied for here, but consummated and accepted there in New Hampshire, and by terms especially made a New Hampshire contract. The stockholder can not say what his withdrawal rights and values are, even under the Illinois law, until determined by

the board of directors, and there was no data on which a verdict could be based even under this section.

The stockholder's application was accepted in New Hampshire and this binds it as a New Hampshire contract.

CHARLES E. SELBY and CONKLING & GROUT, attorneys for appellant.

APPELLEE'S BRIEF.

The rule of law is that the place where a contract is made depends not upon the place where it is actually written, signed or dated, but where it is delivered as consummating the bargain. 1 Daniel's Neg. Instruments, 660; Gay v. Rainey, 89 Ill. 225; Bishop on Contracts (Enlarged Ed.), Sec. 1391.

It was therefore a contract under the laws of Illinois, and under our laws appellant had no power to bind appellee not to demand and recover the money paid by him, for the space of twenty-four months.

It was against the statute. It was against the public policy of this State. Under the statute, domestic corporations are compelled to pay back the amount paid in, less all fines and other charges, on a thirty days' notice being given. Starr & Curtis, Vol. 1, p. 639, Sec. 73.

And by Sec. 26, same volume, foreign companies are bound by the same liabilities, restrictions and duties. Appellant says this section does not apply to this case because appellant does not come under that act.

The Supreme Court, however, has held that section 26 above applies to all foreign companies doing business in Illinois; and were section 26 not considered it would be against the public policy of the State to give foreign companies rights domestic companies do not enjoy. They do business here "by grace," and should be satisfied if they are treated exactly the same as domestic companies. Stevens v. Pratt, 101 Ill. 206; Penn Co. v. Sloan, 1 Brad. 373; Female Academy v. Sullivan, 116 Ill. 381-384; Barnes v. Suddard, 117 Ill. 241-2.

E. L. CHAPIN, attorney for appellee.

OPINION BY THE COURT.

Appellee recovered a judgment against appellant for \$30, being the amount of payments made by the appellee as a stockholder in the appellant corporation. That corporation holds a charter from the State of New Hampshire, authorizing it to transact, in that and other States, the business of a Homestead and Loan Association.

Pursuant to the charter and by-laws, local clubs or branches might be formed whenever a sufficient number of shareholders could be obtained. Such a club was formed in Springfield, in the year 1891.

The appellee subscribed for five shares, and made the first payment of one dollar per share thereon, through one Charles Werner, who assumed to represent the corporation.

A certificate of stock was furnished by the corporation, through said Werner, and the appellee made five subsequent monthly payments thereon, four of them to Werner, who assumed to act as treasurer of the local club, and one to Coe, who, it is conceded, was such treasurer. Having become dissatisfied with the course of things the appellee desired to withdraw from the company, and to be reimbursed the money he had paid in on his stock.

The by-laws of the corporation provide, that after twenty-four payments have been made by a shareholder, his certificate shall be redeemable in cash, *i. e.*, the amount paid in on the shares with six per cent interest thereon.

The appellee could not claim under this by-law, because he had not made the requisite number of payments.

He claims, however, under section 6 of the Homestead Loan Association Act of this State, R. S., Ch. 32, Par. 73, which provides that "any stockholder wishing to withdraw from the said corporation shall have power to do so, by giving thirty days' notice of his or her intention to withdraw, when he or she shall be entitled to receive the amount paid in by him or her, and such interest thereon, or such proportion of the profit thereon, as the by-laws may determine, less all fines and other charges."

This provision relates only to corporations formed under

the general law of this State. But it is urged that by Par. 26 of the same chapter, it is also provided that "foreign corporations and the officers and agents thereof, doing business in this State shall be subjected to all the liabilities, restrictions and duties, that are or may be imposed upon corporations of like character, organized under the general laws of this State, and shall have no other or greater powers."

The main question in the case, therefore, is, whether the charter and by-laws of the foreign corporation, or the provision of Par. 73, (Sec. 6) above quoted, shall control.

The suggestion on the one side is, that by the very terms of the statute, the foreign corporation must in all respects conform to the provisions of the statute, the latter being the measure and model to be followed in every substantial particular (thus in effect substituting our statute for the foreign charter and by-laws), and on the other, that this provision was not designed to affect the natural right or power of one *sui juris*, to become a stockholder under such conditions found in the charter and by-laws of a corporation as he may be satisfied with; that he may, by contract, accept a privilege less than that provided in corporations organized under the statute; that he can not be deprived of the natural power thus to contract, in reference to a matter not opposed by public policy or sound morality; and that having made such contract he can not withdraw from it and assert a right under the statute; and that, furthermore, if it be said that such contract is illegal because in the teeth of the statute, then the parties are *pari delicto* and the law will afford no relief.

It will be noted that, while the statute provides that the shares shall be of the par value of one hundred dollars, the shares in this instance were of the par value of two hundred dollars, pursuant to the by-laws. Other differences between the provisions of the statute and of the foreign charter and by-laws need not be noticed.

After due consideration of the whole matter, a majority of this court agree with the ruling of the Circuit Court, that

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the statute must prevail, and that the appellee was entitled to sue for and recover the payments made upon giving thirty days' notice under the statute, notwithstanding the provisions of the by-laws of the appellant corporation. It is suggested that no sufficient *data* appear from which to estimate the value of the shares, that is, the amount of interest or profit to be allowed thereon in addition to the sum paid in, but as appellee sought to recover only the amount so paid, without interest or profit, the point is not deemed important.

Another objection urged is that the payments were not all properly made; that is to say, that Werner had no right to receive four of them, and the corporation is not bound thereby. Werner acted as the local treasurer, and if he had the right to do so, a payment to him was a good payment under the by-laws.

The evidence tends to show he had such right, and the significant fact that no fines were assessed for non-payment of dues, strongly supports the position that he was the acting treasurer of the club, the treasurer elect having failed to qualify. It is also urged that Werner had no authority to represent the corporation and that notice to him was not sufficient, but we are disposed to overrule this point, upon a full consideration of the evidence relating thereto. We hold also that there is sufficient evidence of notice, such as the statute requires. No other objection being urged, the judgment will be affirmed.

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48	433
79	109

1. *Decrees—Conclusive as to Matters Adjudicated.*—The Appellate Court can look to the decree alone to ascertain what was adjudicated in the court below.

Memorandum.—Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Circuit Judge, presiding. Heard in this

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court at the May term, A. D. 1892, and affirmed. Opinion filed October 24, 1892.

The opinion states the case.

CHAS. E. SELBY and CONKLING & GROUT, attorneys for appellant.

M. U. WOODRUFF and E. L. CHAPIN, attorneys for appellee.

OPINION BY THE COURT.

This case is similar in most of its features to the preceding case of the same appellant v. Lloyd, and the ruling will be the same as to such matters.

An additional point, however, is that the appellee and a number of other shareholders filed a bill in chancery in New Hampshire against the appellant, having for its chief object the winding up of the corporation, praying for the appointment of a receiver, that an account might be taken of the amounts paid in by the several complainants, and that the same might be refunded. It was alleged that the corporation was insolvent, that its proceedings were illegal and that the complainants had been fraudulently induced to enter the association. The decree of the court was that the relief sought be denied. It is insisted that there was in that case an adjudication that the appellee had paid in a sum considerably less than that now sued for and recovered, and that such adjudication is binding here. We think this is a misapprehension. While it is true that in a schedule attached to the opinion of the court the amounts paid in by the several complainants are set forth, including those paid by appellee, yet nothing of the sort appears in the decree.

We can look to the decree alone to ascertain what was adjudged. Indeed, the court having found that the grounds alleged for closing the business of the corporation were not supported by the proofs, there was no occasion to inquire into the state of accounts between the corporation and the complaining stockholders. It is not apparent, therefore, that any matter was adjudged in that proceeding to bar the remedy sought in this. The judgment will be affirmed.

Sullivan v. Sullivan.

1. *Slander—Publication of the Words Complained of.*—If the persons in whose presence and hearing slanderous words are spoken, do not understand their meaning and do not repeat them to others, there is no such publication of the words as will support an action for slander.

2. *Character in Action of Slander.*—Where evidence of the plaintiff's character is competent in an action for slander it should be limited to the time of the alleged slander.

Memorandum.—Action for slander. Appeal from a judgment for the defendant rendered by the Circuit Court of McDonough County; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 24, 1892.

APPELLANT'S STATEMENT OF THE CASE.

Appellant brought suit in this case in the Circuit Court against appellee for slander, charging him with speaking of and concerning her the words: "You are nothing but a damned old whore." Plea, general issue; trial by jury; verdict for defendant.

The words were spoken in the presence of appellant's children, Maggie Sullivan and Jerry Sullivan who, upon cross-examination, said that they did not know the meaning of the words, "You are nothing but a damned old whore."

APPELLANT'S BRIEF.

The words, "You are nothing but a d—d old whore" are actionable *per se*. R. S., Chap. 126, Sec. 1; Elam v. Badger, 23 Ill. 498; Schmisser v. Kreilich, 92 Ill. 347.

Where the words are unambiguous and actionable *per se*, witnesses can not testify what they understand the words to mean. Sasser v. Rouse, 13 Ired. (N. C.) 142; Pitts v. Pace, 7 Jones (N. C.), 558; Jarnigan v. Fleming, 43 Miss. 710; Wright v. Paige, 36 Barb. (N. Y.) 438; Snell v. Snow, 13 Metc. (Mass.) 278; Olmsted v. Miller, 1 Wend. (N. Y.) 506.

The sense in which hearers understood the words is not conclusive upon the jury; the only object of such testimony is as tending to show the meaning hearers of common understanding would and did ascribe to them. *Nelson et ux. vs. Borchenius*, 52 Ill. 236.

The proof of plaintiff's character, if given, must have reference to the offense charged in the slander. *Am. & Eng. Ency. of Law*, Vol. 3, p. 114, note 2.

Evidence of plaintiff's bad character must be directed and applied to her character at and prior to the time of the slander, and not at the time of the trial. *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; *Starkie's Ev.*, pt. 4, 369, 878; 2 *Campb. R.* 251.

NEECE & SON and AGNEW & VOSE, attorneys for appellant.

APPELLEE'S BRIEF.

In a slander suit, it is competent to show by the witnesses who testify to the uttering of the alleged slanderous words, that they did not understand and know the meaning thereof at the time or since the utterance thereof. *Nelson v. Borchenius*, 52 Ill. 236; *Palmer v. Harris*, 100 Am. Dec. 557; *K— v. H—*, 91 Am. Dec. 397; *Hawks v. Patton*, 63 Am. Dec. 266; *Mielenz v. Quasdorf*, 68 Iowa, 726; *Newell on Defamation, Slander and Libel*, 277, Sec. 70.

It is competent to show the sense in which the hearer understood the slanderous words at the time they were uttered, and the effect they produced upon the minds of the hearers, as that is the essence of the injury. *Foval v. Hallett*, 10 Brad. 265; *McKee v. Ingalls*, 4 Scam. 31; *Hawks v. Patton*, 18 Ga. 52.

The slander and the damage consists in the apprehension of the hearers. *Newell on Slander*, p. 301, Sec. 22, p. 311, Sec. 35; *Fleetwood v. Curly*, Hobart, 268.

In mitigation of damages it is competent to show the plaintiff's general reputation and general character. *Greenleaf on Evidence*, Vol. 2, 422, 424 and notes; *Welker*

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v. Butler, 15 Brad. 209; Regnier v. Cabot, 2 Gilman, 34; Sheahan et al. v. Collins, 20 Ill. 326; Witherbee v. Marsh, 51 Am. Dec. 244; Eastland v. Bidwell, 4 Am. Dec. 668; Waters v. Jones, 29 Am. Dec. 261; Douglas v. Tousey, 20 Am. Dec. 616; Lamos v. Snell, 25 Am. Dec. 468; Gilman v. Lowe, 24 Am. Dec. 96; Am. and Eng. Ency. of Law, Vol. 13, pp. 443, 84, 93.

For a general discussion of this question see Newell on Slander, etc., p. 823, and cases cited.

Slandorous words spoken in a foreign language and not understood by the hearers are not actionable. Nelson v. Borchonious, *supra*; Palmer v. Harris, 60 Pa. St. 156; S— v. K—, 20 Wis. 239; Mielonz v. Quasdof, *supra*; Newell on S. and L., p. 277, Sec. 10.

BAILY & HOLLY, attorneys for appellee.

OPINION BY THE COURT.

This was an action for slander. Trial by jury. Verdict and judgment for defendant. Appeal to this court by plaintiff.

There was some conflict as to whether the actionable words alleged in the declaration were actually spoken by the defendant, and while it seems that the weight of evidence is with the plaintiff on this point, yet it may be the jury had sufficient reason for giving the greater credit to the defendant's testimony.

But we presume from all the abstract discloses that the case turned upon another point, which was that the persons who were present at the time of the alleged speaking of the slanderous words did not know the import and meaning of the same. These persons were the three young children of the plaintiff. They testify positively to the speaking of the words, but they say just as positively that they did not understand then, or at the time of the trial, what the words meant.

If this was so, then it was as though the words were in an unknown tongue, or the presence of persons devoid of

the sense of hearing, or to the plaintiff alone, no others being present, in all of which cases there is no ground of action. This, because the essence of the injury is the effect created by the slander upon the minds of the hearers. *Fleetwood v. Curly*, *Hobart Reports*, 267; *Townshend on Slander and Libel*, Secs. 95, 96 and 97; *Starkie on Slander*, Vol. 2, 52; *Nelson v. Borchenius*, 52 Ill. 236.

The action of the court in giving and modifying instructions on this point was correct and the errors assigned in reference thereto must be overruled. If the persons present did not understand the words and did not repeat them to others there was no publication in the legal sense. Some objection is made as to the ruling of the court in refusing to allow certain questions to be put to the witness Jerry Sullivan. Only two questions are involved. When the first was propounded counsel for defendant objected, and without waiting for a ruling by the court, propounded the second, to which objection was also interposed and sustained.

We think no error was committed therein. The questions were both leading and objectionable for that reason, especially when put to a young person, the child of the plaintiff. The second question was objectionable also in the assumption it contained, that the witness understood the words to have the meaning suggested by the question, and that such meaning was in effect slanderous.

It would have been easy enough to frame the questions properly, and we are not disposed to say that the court was too strict in the matter, under the circumstances.

It is objected also, that evidence was admitted as to the general character of the plaintiff without limiting the proof to the time of the alleged slander.

We find no objection on this ground interposed at the time. There was a general objection, which the court overruled, and to this no exception was saved. The evidence, while not in terms confined to the particular time when the words were alleged to have been spoken, evidently refers to that time, though the present tense was frequently used in

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both question and answer, not only in the examination in chief but also in the cross examination. Such an objection should have been specifically made. It is evidently an afterthought. Finding no errors of any importance, we must affirm the judgment.

Hewes et al. v. The People, etc., for use, etc.

1. *Officer—Term of Office Closed upon a Contingency—Sureties.*—Because a certain contingency brings the term of an office to a close, and cuts off or terminates the legal right of the incumbent to perform the acts pertaining to the office, it does not follow that as to the public, his acts are to be discredited or that his sureties are released when his legal right to fill the office has ended. He may be treated as an officer *de facto*. Being such, his acts are valid, not only as against, but also in favor of, third persons; so held where a constable, being required under chapter 103, R. S., to give a new bond, failed to do so, but continued to act.

2. *Officer Holding Over—Sureties.*—When an officer holds over after the expiration of his term, no successor having been elected and qualified, the liability of sureties upon his bond will extend beyond the term for a reasonably sufficient time, within which the successor may qualify.

3. *Officer Failing to Give a New Surety.*—Under chapter 103, R. S., when an officer fails to give a new bond, his duty is to turn over to his sureties, all books, moneys, vouchers, papers, and every description of property pertaining to his office, and the sureties may enforce their rights in this respect, by an action of replevin. It is within their power to proceed against him by *quo warranto* or by *mandamus* to require the proper authorities to call an election, etc.

4. *Sureties—Official Bonds—Liability as to Third Persons.*—As the sureties have, by signing an official bond, enabled a person to possess a public office and exercise its functions, and as they have various means under the statute by which to divest the party of his official power, in case of malfeasance on the part of the person holding the office, as between his sureties and an innocent third party, they ought to bear the burden of his official malfeasance.

Memorandum.—Action of debt on a constable's bond. Appeal from a judgment rendered by the Circuit Court of McDonough County; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 31, 1892.

STATEMENT OF THE FACTS BY THE COURT.

This was an action on the official bond of Albert I. Hewes, as constable.

The declaration alleges, in substance, that Albert I. Hewes was elected constable in and for Bushnell township, in McDonough County, Illinois, and that on the 11th day of April, A. D. 1889, the said Albert I. Hewes, as principal, and James Cole, Ross Manly and William Dawson, as sureties, entered into a writing obligatory, which was a constable's bond, in the usual form, with the usual condition, in the penal sum of \$2,000; that said bond was filed with the clerk of the proper county and within the time fixed by law; that he entered upon the duties of his office; that while acting as such constable, on the 1st day of October, A. D. 1890, a judgment was obtained in favor of the Bushnell Machine and Transfer Company against one John Spurgeon, before one J. B. Spicer, a justice of the peace in and for said McDonough county, and State of Illinois, for the sum of \$168.68; that on the 3d day of December, A. D. 1890, an execution was issued on said judgment and placed in the hands of said Albert I. Hewes, as constable, for collection; that said Hewes collected thereon the sum of \$168.68 from said Spurgeon, with costs; that he failed and refused to turn it over to plaintiffs, and that thereby an action accrued in their behalf on account of such neglect and refusal.

To the declaration the defendants pleaded firstly and jointly *non est factum*, on which the plaintiffs took issue.

The defendant Ross Manly, for second plea, pleaded separately, that he had performed all things on his part to be performed, by reason of anything contained in said bond, until the 18th day of September, A. D. 1890, when he gave notice in writing to said Albert I. Hewes that he desired to be released from his bond as constable, and that he, Hewes, give new bond, with sufficient sureties, within ten days from the date of such notice, and that he, defendant Ross Manly, did, within five days after the service of such notice, deliver a copy of such notice, with an affidavit of the time and manner of service, to the county clerk of McDonough county.

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The defendants, James Cole and William Dawson, filed a second plea, same as the said second plea of defendant, Ross Manly.

To the second pleas so filed by the said Manly and Cole and Dawson, the court sustained a demurrer, and exception was taken to this ruling. The defendants abided by their pleas. The cause proceeded to trial on the issue of *non est factum*, resulting in a judgment for the plaintiffs, from which defendants appeal.

APPELLANTS' BRIEF.

By reference to Section 7, Chapter 79, Hurd's Statutes, in relation to justices and constables, the following language may be found: "If any justice or constable shall not, within twenty days after his election or appointment, take the oath and give bond as aforesaid, such justice or constable shall not be permitted after that time to qualify, but the office shall be considered as vacant, and filled accordingly."

The section is the only mode provided by statute whereby the sureties on official bonds may be released from further liability. It places the power within reach of sureties on official bonds to cause a vacation of the office and effectually relieve themselves from further liability. *Stern et al. v. The People*, for use, etc., 102 Ill. 550.

"While the liabilities of sureties are to be strictly construed, it is not the duty of courts to aid them to escape liabilities by technical, hypercritical construction." This language was used where the sureties were seeking to avoid liability on a bond for mere technical reasons, as will appear by reading the case; yet the court holds that the liability of sureties is to be strictly construed. *Cawley et al. v. The People*, 95 Ill. 249.

Where a contract of surety relates to the acts and conduct of one in office, a recovery must be based on a violation of the condition, occurring during the official term, and then are liable only for official acts done or omitted. *People v. Toomey*, 25 Ill. App. 46. The liability of a surety is *strictissimi juris*—it can not be extended by construction.

If the term of an officer is for a definite period, the sureties are only liable for acts performed during such period. *People v. Toomey*, 122 Ill. 311.

D. CHAMBERS and PONTIOUS & MICKY, attorneys for appellants.

T. J. SPARKS and SHERMAN & TUNNICLIFF, attorneys for appellees.

OPINION BY THE COURT.

The statute, Sec. 10, Ch. 103, declares that where the surety has given notice, etc., as therein provided, if the officer shall fail to give a new bond within ten days after receiving the notice, or such further time, not exceeding twenty days, as may be allowed him, the "office shall become vacant and the vacancy shall be filled as provided by law." It is urged on behalf of appellants that because the office thus becomes vacant, there was no legal power in the constable to further exercise the official functions and therefore his sureties are not affected by anything he did while acting without legal authority. It will be noticed that the section referred to does not say that the parties are released upon the contingency so arising, though by the following section 12, it is provided in express terms that if a new bond is given they shall not be responsible for the acts of the officer in consequence of business coming to his hands after the approval of the new bond. What, then, is the legal effect of the office becoming vacant, the vacancy to be filled as in other cases? The question is by no means free from difficulty. The majority of this court are, however, inclined to hold that as to third persons the principal in the bond is to be regarded as officer *de facto*, that his acts as such would be valid, and those persons so interested in the official acts performed by him are to be protected. In the case of *Sunphy v. Whipple*, 25 Mich. 10, the sheriff had failed to renew his bond. The constitution provided that such officer might be required by law to renew his security from

Hewes v. The People.

time to time, and in default of giving such surety, the office should be deemed vacant. The statute subsequently enacted provided for the renewal of the bond at certain times, but did not expressly declare the office should be vacant for failure therein. The court held that whether it was vacant or not, if the incumbent continued in office and remained sheriff *de facto*, that he was in by virtue of his election—that it was the election which justified his being treated as anything but a usurper, and that, together with his action under it, protected those interested in his official acts. The sureties were held liable.

In *Placer Co. v. Dickerson*, 45 Cal. 12, the county treasurer retained possession of the office after his term expired and collected money while so holding over, and his sureties were held.

The court remarked he was an officer *de facto* and that the responsibility of the sureties was the same as though the officer had, after the expiration of his term, continued in office pending proceedings by *quo warranto* to oust him, and in that case the liability would be unquestionable.

In *The State v. Muir*, 20 Mo. 303, the officer had removed from the State and had thereby vacated his office, but it was held his sureties were liable for the acts of a deputy after such removal.

It would seem, therefore, that because a certain contingency brings the term of office to a close and cuts off or terminates the legal right of the incumbent to perform the acts pertaining to the office, it does not follow that as to the public his acts are discredited, or that his sureties are released when his legal right to fill the office has ended. He may still be treated as an officer *de facto*. Being such, his acts are valid and binding not only as against, but also in favor of, third persons.

Again, the statute provides that the term of the constable's office shall continue four years, or until a successor is elected and qualified. Ch. 79, Sec. 1, and Sec. 10 of Ch. 103 already referred to, declare that the vacancy created by the failure to give new bond "shall be filled as provided by law," that is, by appointment or by a special election, ac-

according to the amount of unexpired time of the original term. It has been held under similar provisions, that where the officer holds over after the end of his term, no successor having been elected and qualified, the liability of the bond will extend beyond the term for a reasonably sufficient time, within which the successor may qualify. *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Mayor of Rahway v. Crowell*, 11 Vroom, 207; *City, etc., of Montgomery v. Hughes*, 65 Ala. 201; *County of Scott v. Ring*, 29 Minn. 398.

It has ever been held that in such case liability continues during a second term of the same incumbent. *Butler v. The State, etc.*, 20 Ind. 169.

Turning again to the statute, Sec. 12, Ch. 103, it will be seen that when the officer fails to give the new bond it shall be his duty to turn over to his sureties all books, moneys, vouchers, papers and every description of property pertaining to his office, and that the sureties may enforce their rights in this respect by action of replevin. It would, of course, be within their power to proceed against him by *quo warranto* or by mandamus to require the proper authorities to call an election.

As the sureties have, by signing his bond, enabled him to possess the office and exercise its functions, and as they have these various means by which to divest him of official power, it would seem that as between them and an innocent third party, such as a plaintiff in execution, they ought, upon familiar principles, to bear the burden of his official malfeasance. We find nothing in the statute exonerating them, aside from the argument drawn from the provision that when he fails to give a new bond the office shall become vacant and the vacancy shall be filled as provided by law, which we have just discussed. Doubtless, adjudged cases may be found supporting the position of appellants, but the value of those cases may depend more or less upon local statutes. After the best consideration we have been able to give the question, we are disposed to regard the weight of reason and authority as being with the conclusion reached by the Circuit Court.

The judgment will be affirmed.

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48	445
102	1836

1. *Corporations—Ultra Vires.*—Corporations have such powers as are expressly given them by the law which authorizes their creation, and such other powers as are necessarily incidental to the proper exercise of such express powers. Such express powers are readily ascertained from the statute or the charter of the corporation.

2. *National Banks—Right to Make Donations of Money.*—The right to make donations of money is not among the chartered powers of a national bank. The directors can use the funds and property of the bank only for proper banking purposes and for the strict furtherance of the business objects and financial prosperity of the corporation.

3. *National Banks—Use of Funds for Charity, etc.*—The directors of a national bank can not use any portion of the money of the bank for objects of usefulness or charity, or the like, however worthy of encouragement or aid. They can not make gifts from the corporate funds.

4. *National Banks—Incidental Powers of the Directors.*—The incidental powers of the directors of a national bank are such as are necessary to the efficient exercise of the express powers. A donation of the sum of \$500 of the funds of the bank, to induce a manufacturing company to remain in the town where such bank is located, is unauthorized and illegal.

Memorandum.—Suit against stockholders in a national bank for misappropriation of funds. Appeal from a decree in favor of complainants rendered by the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 31, 1892.

APPELLANTS' STATEMENT OF THE CASE.

The First National Bank of Charleston was organized with a capital stock of \$100,000, divided into 1,000 shares of \$100 each. Complainants are the owners of 320 of said shares; and appellants, who own 280 shares, are the directors of said bank. On December 1, 1892, appellants, at a meeting of the directors, by resolution, authorized and instructed the president to subscribe for said bank \$500, to be paid to retain the Bain Manufacturing Company at Charleston. On January 19, 1891, at a meeting of said directors, the president was instructed and authorized to pay over to the trustees authorized to receive subscriptions for the purpose

of retaining the Bain Manufacturing Company in Charleston, the sum of \$500 theretofore subscribed by the bank for that purpose, and charge the same to the expense account; and that afterward the president did pay said sum to said trustees, and had the same charged to the expense account. Complainants filed a written protest with said board of directors against said payment, but appellants disregarded it. Said payment was a mere gift or donation to the company. On May 6, 1891, appellant Curtis L. Davis, by order of appellants, charged up to profit and loss \$214.34, being the amount of a judgment, attorney's fees and costs of James Hamilton for the use of Patrick Kane against Francis M. Randolph and William E. McCrory in the Circuit Court of Coles County, Illinois; that said bank was under no obligation to pay said sum, and the payment thereof was a mere gift to said William E. McCrory. Before bringing this suit complainants demanded of the bank that it bring suit against appellants to recover said sums of money, but the bank, being controlled by appellants, refused to do so. Complainants sued for themselves and all other stockholders except appellants, and prayed that appellants might be decreed to pay back said several sums of money to the bank. A demurrer to the bill having been overruled, and appellants electing to stand by their demurrer and declining to answer, the court decreed that appellants repay both of said sums of money to the bank, and pay costs. To reverse this decree appellants prosecute this appeal.

APPELLANTS' BRIEF.

For the complainants in this case to carry on this litigation, they should show in their bill, to the satisfaction of the court, that they have exhausted all the means within their reach to obtain, within the corporation itself, the redress of their grievances, or action in conformity to their wishes.

"He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the

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court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body in the matter of which he complains. And he must show a case, if this is not done, where it could not be done or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity." Hawes v. Oakland, 104 U. S. 450.

Our own Supreme Court, in *Richelieu Hotel Co. v. International Military Encampment Co.*, 29 N. E. Rep. 1044, which was a suit upon a subscription of \$1,000 by said hotel company to a fund to establish a military encampment at Chicago, say: It is next urged that said subscription by the defendant is *ultra vires*. It may be inferred from the name of the defendant corporation that it was organized for the purpose of maintaining and operating a hotel. It also appears from those portions of the defendant's certificate of incorporation read in evidence that the object for which it was incorporated was "to conduct a general hotel business."

WILEY & NEAL and A. J. FRYER, attorneys for appellants.

APPELLEES' BRIEF.

The liability of the directors for a misuse of the funds of the bank is joint and several, and all directors who take any part in the illegal transaction are liable. Thompson on Liability of Officers of Corporations, 353, 354.

The directors of banks are trustees for the bank, the stockholders and the depositors, and to each they owe duties, for the violation of which the law will hold them liable. *Delano v. Case*, 17 Brad. 536, affirmed in 121 Ill. 249.

Whenever a cause of action exists, primarily in the bank against the directors for misapplying the funds of the corporation, or wrongfully dealing with the corporate property, and the corporation either actually or virtually refuses

to institute or prosecute the suit, then an action may be brought and maintained by a stockholder or stockholders, either individually, or suing on behalf of themselves and all others similarly situated, against the wrong-doing directors. *Robinson v. Smith*, 3 Paige (N. Y.) 231-232; *Peabody et al. v. Flint et al.*, 6 Allen (Mass.) 52; *City of Chicago v. Cameron et al.*, 120 Ill. 456; *Thompson's Liability of Officers of Corporations*, 265, 352, 383, 391; *Hodges v. New England Screw Co.*, 1 R. I. 312.

If the corporation is under the control of the guilty directors, or if, for any cause, there is a reasonable certainty that the corporation would not sue, then there is no necessity for a demand to sue. The directors could not be trusted to control and prosecute a suit against themselves. *Chicago Hansom Cab Co. v. Yerkes*, *Chicago Legal News*, May 21, 1892, Vol. 24, p. 307; *City of Chicago v. Cameron et al.*, 120 Ill. 457; *Robinson v. Smith*, 3 Paige (N. Y.) 232-233; *Thompson on Liability of Officers of Corporations*, 265-383.

When the acts complained of are *ultra vires*, application to, and refusal of, directors to institute a suit is not essential in order to authorize a suit by a stockholder. *Wood's Field on the Law of Corporation* (2d Ed.) 513-514, Secs. 360, 361; *Heath v. Erie R. R. Co.*, 8 Blatch. (U. S.) 347; *Brewer v. Boston Theater*, 104 Mass. 378.

Even if a demand was necessary, the allegation of demand made in the bill is sufficient. *Thompson's Liability of Officers of Corporations*, 385, 386.

The liability of officers is joint and several, and directors who take any part in the illegal transaction are liable. *Thompson's Liability of Officers of Corporations*, 353, 354.

JAMES A. EADS, solicitor for appellees.

OPINION BY THE COURT.

The appellees filed a bill in chancery in the Circuit Court of Coles County, in which they allege that they are the owners of 320 shares of the capital stock of the First National Bank of Charleston, Illinois, a corporation organized under the national banking laws, and that

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the appellants own 280 shares of the stock of the corporation and compose the board of directors of the bank; that the capital stock of the bank is \$100,000, divided into 1,000 shares of \$100 each; that the defendants, as such directors, at a meeting of the board on the 1st day of December, 1890, by a resolution duly passed and entered of record, directed the appellant, William McCrory, president of said bank, to subscribe for said bank the sum of \$500, to retain the Bain Manufacturing Company at Charleston; and afterward, on the 19th day of January, 1891, at a meeting of the board of directors (the defendants), a resolution was adopted instructing and directing the president of the bank to pay to the trustees appointed to receive subscriptions for the purpose of retaining the Bain Manufacturing Company at Charleston the sum of \$500, and to charge the same to the expense account of the bank; that the president, in compliance with the resolution and direction of directors, took of the funds of the bank the sum of \$500, and paid it to the said trustee, and had the same charged to the expense account of the bank, which payment is alleged to be an illegal disposition of the moneys of the bank and an injury to said bank and its stockholders; that such payment was a mere gift or donation to said Bain Manufacturing Company, and that before it was paid the complainants filed with said directors a protest in writing against the payment, which the defendants wholly disregarded.

The bill further alleged that by the order of the defendants (directors of said bank) the sum of \$214.34 was paid out of the funds of the bank upon a judgment rendered in the Circuit Court of Coles County in favor of James Hamilton, for the use of Patrick Kane, and against Francis M. Randolph and William E. McCrory, and said sum, by order of the defendants, charged to the account of profit and loss on the books of the said bank; that the bank was in no wise indebted upon said judgment and under no obligation to pay the same, and that such payment was a mere gratuity to William McCrory and in fraud of the rights of said bank and its stockholders.

It is then alleged that the persons defendant to the bill, and who did the acts complained of, are still the directors and officers of the bank, and that therefore a demand upon said bank to bring suit would have been wholly useless, yet that the complainants (appellees) did, before beginning the suit, demand of said bank that it bring suit to recover said money, but that said bank, being controlled by the defendants (appellants), refused to do so.

The bill further averred that the capital stock of the bank was held by some forty or fifty persons, some of whom were unknown, some residents of other states or territories, and that it would be impracticable to make them defendants, but that the suit is brought for all stockholders (except the appellants) who may wish to join. The bill closed with a prayer for a decree against the appellants for the payment to the bank of the sums so, as alleged, illegally disbursed.

To this bill the defendants interposed a demurrer, the only ground of objection being that the matters alleged in the bill were insufficient to entitle the complainants therein to any relief in equity. The court overruled the demurrer and required the defendants to answer, which they declined to do, but elected to abide the demurrer. Whereupon a decree was rendered in favor of the bank and against the appellants for the moneys shown by the bill to have been improperly paid out of the funds of the bank by order of the appellants. From this decree the appellants prosecute this appeal.

The decree must rest upon and be supported by the bill, and it is asserted that the bill is insufficient in several respects. It is first objected that the bill does not sufficiently allege that each of the defendants committed or participated in the commission of the alleged wrongful acts of the board of directors.

The allegation of the bill as to the first misappropriation is "that at a meeting of the board of directors of said bank, said defendants, by a resolution duly passed, instructed and authorized" the president of the bank to subscribe \$500, to be paid by the bank to retain the manufacturing company in Charleston, and as to the other alleged wrongful applica-

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tion of funds the allegation is that "Curtis L. Davis charged up to the account of profit and loss, by the order of the defendants (the directors of the bank), the sum of \$214.34, being the amount of a judgment," etc.

The language employed in each of these allegations seems to us to charge that all the defendants participated in the acts complained of, especially as the only alleged ground of insufficiency mentioned in the demurrer is the general one that the allegations of the bill are insufficient to entitle complainants to any relief whatever.

It is urged that it does not sufficiently appear from the bill that the complainants, before instituting the suit in their own names, endeavored, as required by law, to have the corporation redress the grievance complained of. The cause of action and the right of action is primarily in the bank. A recovery, if had, is for the benefit of the bank. This action is, however, against the officers and directors of the bank, who, as such, control its corporate action. The bill avers that the appellees, before bringing suit, did demand that the bank should institute the proceeding, but that the defendants (appellants), being the managing officers and directors of the bank, refused to do so. We do not think such demand was at all necessary, or that the complainants (appellees) were required to endeavor to obtain action by the stockholders as a body. Such united action may be desirable, but it is not indispensable to a successful prosecution of the action. An individual stockholder may present the cause to the court by a bill in chancery and maintain the suit in behalf of himself and for the benefit of the corporation, making the corporation a party either complainant or defendant. *Pomeroy Eq. Juris.*, Vol. 3, p. 10; *Robinson v. Smith*, 3 Paige, 222; *Chicago v. Cameron*, 120 Ill. 447; *Chicago Hansom Cab Co. v. Yerkes*, 30 N. E. Rep. 667.

It is said that it does not appear from the bill that the bank was without power to contribute \$500 toward a fund to be used in securing the retention of the Bain Manufacturing Company at Charleston. It is argued with much earnestness that the donation, viewed simply from a busi-

ness standpoint, may have been decidedly advantageous to the financial interests of the bank. In this connection we are asked to consider the case of *Richelieu Hotel Co. v. International Encampment Co.*, 29 N. E. Rep. 1044, where it is held by our Supreme Court that a subscription by the hotel company (a corporation) to a fund, to aid in establishing and holding, near the city of Chicago, an international military encampment, was not beyond its corporate power. In that case it is said: "Power to carry on the hotel business necessarily carries with it, as an incident, the power to adopt and promote reasonable expedients, directly calculated to increase the number of patrons of the hotel. The holding, in or near the city of Chicago, of an international military encampment, * * * was likely to bring a large number of strangers who would necessarily need hotel accommodations, and would thus largely increase the patronage of the various hotels in the city—the *Richelieu* among the rest. So it is argued, in the case at bar, that the *Bain Manufacturing Company* might add greatly to the business and the population of Charleston, and might deposit larger sums of money in the bank, or might, as a borrower of money, become a customer of the bank, etc., and that the directors ought to be vested with the power of aiding in retaining such an institution in the city as incidental to the express power granted to it to conduct the general business of banking.

"We understand the rule to be that corporations have such powers as are expressly given them by the law which authorizes their creation, and such other powers as are necessarily incidental to the proper exercise of such express powers. The express powers are readily ascertained from the statute or the charter of the corporation. The right to make donations of money is not among them."

"The directors (of a national bank) can use the funds and property of the bank only for proper banking purposes, and for the strict furtherance of the business objects and financial prosperity of the corporation. They can not use any portion of the money for objects of usefulness or

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charity or the like, however worthy of encouragement or aid. They can not make gifts from the corporate fund. All their transactions must be strictly matter of business." Morse on Banks and Banking, Vol. 1, Sec. 127, p. 258, 259.

The incidental powers are such as are necessary to the efficient exercise of the express powers. A donation of the funds of a bank is *prima facie* unauthorized. Such power is not expressly given, nor is it apparent, in the absence of proof of special circumstances, that it is necessary to the proper and successful exercise of any express power. The donation by the Richelieu Hotel Company to a fund raised for the particular purpose of bringing together, in or near to the city, a large number of persons, who would necessarily need hotel accommodations, was deemed by the Supreme Court so clearly intended and likely to advance the financial interests of the hotel company that it was but a judicious exercise of power incidental to the general power given that corporation "to conduct a general hotel business." It was but an expenditure of its corporate funds for the purpose of increasing the number of its patrons and consequently its receipts. It may be conceded to be apparent that the retention of the Bain Manufacturing Company at Charleston would be of general benefit and advantage to that city, but that the bank will be financially benefited, except so far as it may share in the general prosperity of the community, does not appear. That its pecuniary interest will be advanced and directly forwarded can not be assumed from the mere fact that a manufacturing company is induced to continue its business in the same city in which the bank is located.

The presumption is that the mere donations are injurious to a bank and unwarrantable. If directors order such donations to be made they must be prepared to show the particular circumstances which called for and justified such a diminution of the funds intrusted to their care. The allegations of the bill show, *prima facie* at least, unauthorized appropriations of the moneys of the bank; and further, the bill charged that the appropriation to the fund for the manufacturing company was an injury to the bank.

The directors were called upon to answer, and if peculiar facts and circumstances existed which justified the bank in aiding in the retention of the manufacturing company or in paying the judgment mentioned in the bill, the directors should have set up and made such facts known in an answer to the bill.

The demurrer was, we think, properly overruled, and the decree which followed, properly rendered. It must be and is affirmed.

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Havana Press Drill Co. et al. v. Ashurst et al.

1. *Patent Laws.—Jurisdiction of the Federal Courts.*—The Federal courts have exclusive jurisdiction of all cases under the patent laws. The purpose of the patent laws is to create and preserve a monopoly in the invention, in favor of the patentee, but the Federal courts have no concern with the mode or extent of the enjoyment of the monopoly by the patentee. His right in the patented invention is considered as an article of property, and his contracts with others as to its ownership or enjoyment, do not concern the existence of the monopoly.

2. *Contests Relating to Property in Patent Rights.*—A controversy as to such property, or contract right, is not a case under the patent laws, but may be determined by courts having ordinary jurisdiction over such subjects.

3. *Scope of the Patent Laws.*—The patentability and scope of the invention, the validity of the patent, the right of the patentee to forbid others to employ or use it without his consent, are matters within the scope of the patent laws. But controversies in regard to its authorized use by another, are matters with which the patent laws have no concern.

Memorandum.—Bill in chancery for specific performance. Appeal from a decree of the Circuit Court of Mason County. The Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 31, 1892.

APPELLANTS' BRIEF.

A distinction must be drawn between the invention itself and the patent issued therefor to the inventor. Property in a patented invention is two-fold; the invention itself and

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the monopoly. The first is the common law right, and may be dealt with as other property at the common law. The latter is statutory and can only be dealt with as prescribed by the statute. Robinson on Patents, Sec. 753-55.

Such an invention, even before the patent is applied for, is subject to a contract of sale, which, if made, will carry with it the patent when afterward issued. Robinson on Patents, Secs. 368, 408, n. 3, 409, 469, 771-2; Bunker v. Stevens, 26 Fed. Rep. 245; Continental Wind Mill Co. v. Empire Wind Mill Co., 8 Blatch. 295; Hammond v. Mason & Hamlin Organ Co., 92 U. S. 724; McClurg v. Kingsland, 1 How. 202; Rathbone v. Orr, 5 McLean, 131; Marshall v. Peck, 1 Dana, 609; Appleton v. Bacon, 2 Black, 699.

An assignment of an imperfect invention with all its future improvements, is an assignment of the perfected result, and the assignee is the owner of the patent when issued. Littlefield v. Perry, 21 Wall. 205; Same case, 7 Official Gazette, 964.

On an agreement to assign a future patent, the right to an assignment becomes absolute when the patent issues. Satterthwait v. Marshall, 4 Del. Chan. 337.

Such a contract will be specifically enforced in equity. Robinson on Patents, Sec. 771 n. 4; Hapgood v. Rosenstock, 23 Blatch. 95; 23 Fed. Rep. 86; Ex parte. Edison, 7 Official Gazette, 423.

It need not be in writing, but may rest in parol. Such a parol contract will be enforced in equity the same as if in writing. Whitney v. Burr, 115 Ill. 289; Burr v. De La Vergne, 102 N. Y. 415; Robinson on Patents, Sec. 1228; Sumerby v. Buntin, 118 Mass. 279; Burk v. Partridge, 53 N. H. 349; Lockwood v. Lockwood, 33 Iowa, 509.

An agreement to hold a patent in trust for another may be by parol. Blakeney v. Goode, 30 Ohio St. 350.

A corporation may enter into such a contract without special charter powers for that purpose. Dorsey Harvester Rake Co. v. Marsh, 6 Fisher, 387.

A license which differs somewhat from an assignment is sometimes implied from the relations existing between the

patentee and other persons; thus, where an invention has been made by a workman at the expense of his employer, who gave him extra wages on account of his skill as an inventor, the employer *prima facie* has a right to use it. *Bensley v. Northern Horse Nail Co.*, 26 Fed. Rep. 250.

If one co-partner make an invention at the cost of the firm, the right to use it becomes vested in the partnership, and is not affected by the retirement of the inventor from the firm. *Wade v. Metcalf*, 16 Fed. Rep. 130; *Slemer's Appeal*, 58 Penn. St. 155; *Montross v. Mabie*, 30 Fed. Rep. 234; 41 O. G. 931.

A license of the same character arises in favor of a corporation, one of whose members is the owner of a patented invention, if he knowingly permits its employment in their business and receives his proportion of the benefit to be derived therefrom. *Robinson on Patents*, Sec. 833; *Detweiler v. Voëge*, 19 Blatch. 482; 8 Fed. Rep. 600; *Robinson on Patents*, Sec. 414; *Continental Wind Mill Co. v. Empire Wind Mill Co.*, *supra*; *Bensley v. Northwestern Horse Nail Co.*, *supra*; *Jencks v. Langdon Mills*, 27 Fed. Rep. 622; 36 O. G. 347.

When a workman is hired to invent, the employer will own the inventions which fall within the scope of the contract, while all others will belong to the employe. *Joliet Manufacturing Co. v. Dice*, 105 Ill. 649; *Dice v. Joliet Manufacturing Co.*, 11 Ill. App. 109; *Damon v. Eastwick*, 14 Fed. Rep. 40; 22 O. G. 1709; *Hapgood v. Hewitt*, 119 U. S. 226; 37 O. G. 1247.

Where an inventor has allowed his employer to deal with his invention as his own, he may be estopped from claiming it. *National Feather Duster Co. v. Hibbard*, 11 Biss. 76; 9 Fed. Rep. 558; *Dixon v. Moyer*, 4 Wash. 68; *Robinson on Patents*, p. 12, Sec. 857; *Ibid.*, p. 16, Sec. 851-2; *Teas v. Albright*, 13 Fed. Rep. 406; *Smith v. Standard Laundry Machine Co.*, 20 Blatch. 360; *Ibid.*, 19 Fed. Rep. 825; *De Witt v. Elmira Nobles Mfg. Co.*, 66 N. Y. 459; *Kelly v. Kelly Scroll Mfg. Co.*, 15 Ill. App. 547.

This remedy must be sought in the courts of the United

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States. Robinson on Patents, Vol. 3, p. 12, Sec. 857; Ibid., p. 16, Sec. 861-2; Teas v. Albright, 13 Fed. Rep. 406; Smith v. Standard Laundry Machine Co., 20 Blatch. 360; 19 Fed. Rep. 825; DeWitt v. Elmira Nobles Mfg. Co., 66 N. Y. 459.

H. M. MASTERS and McCULLOCH & McCULLOCH, attorneys for appellants.

APPELLEES' BRIEF.

To warrant "specific performance" the contract must be certain, reasonable, fair, just, and not unconscionable. Fry on Spe. Per., Chap. 4, Sec. 229, and Note 1, *et seq.*; Dice v. Joliet Man. Co., 11 App. 109; Hartwell v. Black, 48 Ill. 304; Gosse v. Jones, 73 Id. 508; Bowman v. Cunningham, 78 Id. 48; Walker v. Douglas, 70 Id. 445; Stone v. Pratt, 25 Id. 25; Lear v. Choteau, 23 Id. 39; Montgomery, etc., v. Street, etc., 37 Ill. App. 289.

As a general rule, subject to a few exceptions, a court of chancery follows the law in applying to the statute of limitations to cut off stale demands. Walker v. Ray, 111 Ill. 319; Harris v. McIntyre, 118 Id. 281; Davies v. Atkinson et al., 124 Ill. 474; McDowell v. Chicago Steel Works, 124 Ill. 491.

"A naked assignment or agreement to assign in gross a man's future labors as an author or inventor, in other words, a mortgage on a man's brain, to bind all its future products, does not address itself favorably to our consideration." Montgomery, etc., v. Street, etc., 37 Ill. App. 289.

THOMAS N. MEHAN and JOHN W. PITMAN, solicitors for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The appellants by this, a bill in chancery, sought the specific enforcement of an alleged contract of the appellee John L. Ashurst, to assign certain patents to the appellant company.

The bill alleged that the patents in violation of such

agreement and in fraud of appellants' right had been assigned to Lewis H. Ashurst, and he was for that reason found as a defendant to the bill. The appellees answered denying the right of the appellants to the relief prayed and by leave of the court filed a cross-bill in which they charge that the appellants, assuming to be the owners of the patents by virtue of the alleged contract, licensed and authorized the Stoddard Manufacturing Company, an Ohio corporation, to manufacture the patented implements in consideration of the payment of a certain royalty to the appellants, and that under such license a large number of the implements had been manufactured and sold. The cross-bill makes the Stoddard Manufacturing Company a party and prays that an account be had and taken of the royalty or license fee paid to the appellants or due to them and for a decree ordering same to be paid to the appellee (complainants in the cross-bill). The appellants (defendants to the cross-bill) answered, admitting that the Stoddard Manufacturing Company has been and is engaged in the manufacture of the patented implement under contract to pay royalty or license fee as charged, and justifying such contract upon the ground that the appellants became the owners of the patents upon the implements by virtue of the contracts with the patentee, John L. Ashurst, set up in and sought to be specifically enforced by the original bill.

The answer also insists that the matters set up in the cross-bill relate to the enforcement of the patent laws of the United States, and are therefore within the exclusive jurisdiction of the Federal courts.

The court, after hearing and considering a vast amount of testimony, rendered its decree dismissing the original bill and granting the prayer of the cross-bill. This is an appeal from that decree.

The testimony heard by the court was voluminous and in many material respects directly conflicting. The credibility of witnesses who appeared in person before the trial judge and the weight of their evidence was necessarily involved in the determination of the questions of fact. We have ex-

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amined this evidence as abstracted and find that it sufficiently supports the findings and decree of the circuit judge.

Upon familiar principles we ought not, under such circumstances, to interfere with the conclusion of the Circuit Court upon mere question of fact. We have given attention to the alleged lack of jurisdiction in the Circuit Court over the subject-matter of the cross-bill. The Federal courts have exclusive jurisdiction of all cases under the patent laws.

Is this such a case? The purpose of the patent laws is to create and preserve a monopoly in the invention in favor of the patentee.

They have no concern with the mode or extent of the enjoyment of the monopoly by the patentee. His right in the patented invention considered as an article of property, and his contracts with others as to its ownership or enjoyment, do not concern the existence or continuance of the monopoly. A controversy as to such property or contract right is not a case under the patent laws, but may be determined by the courts having ordinary jurisdiction over such subjects. In the case at bar the patentability and scope of the invention, the validity of the patent, the right of the patentee to forbid others to employ or use it without his consent, are admitted. The controversy is whether he has authorized its use by another.

With this the patent laws have no concern. Robinson on Patents, 3d Vol., Secs. 854—857.

There appears no reason why we should interfere with the decree and it is affirmed.

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1. *Personal Injuries—Evidence of Other Accidents—Changed Conditions.*—A person was fatally injured at a public fountain, as was claimed, by reason of its defective construction. His administrator was allowed to prove the occurrence of other accidents at the same place without

showing that the fountain was in the same condition as it was when the deceased was injured, it appearing that a change had been made in the condition of the fountain. The change consisted in removing the elbows from the ends of projecting spouts. *It was held*, that how far the removal of the elbows worked a material and substantial change in the condition of the fountain was a question of fact for the jury, under proper instructions, to say whether the fountain continued dangerous after the change.

2. *Action for Injuries—Previous Accidents—Evidence of, When Competent.*—Where, upon the trial of an action for personal injuries resulting from the defective construction of a public fountain, evidence of other accidents, without proof that the fountain was in the same condition as when the injuries complained of were received, upon assigning the same for error, *it was held*, that if the evidence of previous accidents was admitted as tending to show that the condition of the fountain was dangerous, it would be necessary to show that the condition of the fountain at the time of such accidents was substantially the same as when the accident in question occurred; but if it was admitted for the purpose of showing that the city had notice of the defective construction of the fountain, then somewhat different considerations were involved. From the fact that accidents frequently occurred, the city would be presumed to know that this was dangerous, and was called upon to obviate the difficulty and remove the cause of the trouble; and if an effort was made in that direction, it would be a question of fact for the jury, under proper instructions, as to how much diligence was shown and what was thereby accomplished.

3. *Evidence—Introduction, Objection and Exceptions.*—Where evidence is offered and the opposite party objects, and the court overrules the objection, an exception must be taken to the ruling of the court if the party, deeming himself prejudiced thereby, desires to assign the ruling of the court for error on appeal.

4. *Evidence—Precautions after an Accident.*—Evidence of precaution taken after the occurrence of an accident is apt to be interpreted as an admission of negligence and should not be admitted.

Memorandum.—Action for personal injuries resulting in death. Appeal from a judgment rendered by the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 31, 1892.

APPELLEE'S STATEMENT OF THE CASE.

The deceased, Silas M. Legg, lost his life, as was claimed, by the negligence of the city of Bloomington; his father, as administrator, sued the city in this action for the resultant

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damages. The negligence complained of consisted in this: In connection with its public waterworks the city erected a drinking fountain for horses on its principal street, and provided gas pipes in the fountain protruding, to conduct the water into the basin where horses were to drink. These iron pipes stuck out over the drinking basin several inches, so that horses in drinking would catch their bridles or harness, and by pulling off the bridles, or breaking bridles or harness, would be frightened and run off. The pipes should have been sawed off smooth or even with the body of the fountain, and this would have thrown the water into the basin without spouts.

• APPELLANT'S BRIEF.

It was error to permit plaintiff to show that other accidents had occurred on account of the fountain spouts. *Hodges v. Bearse*, 129 Ill. 87; *P. & P. U. Ry. Co. v. Clayberg, Admr.*, 107 Ill. 644; 1 *Greenleaf's Ev.*, Sec. 52; *Darling v. Westmoreland*, 52 N. H. 401.

It was error to permit plaintiff to show that other accidents had occurred on account of fountain spouts when they were not in the same condition as they were when the accident in question took place. *Legg, Admr., v. City of Bloomington*, 40 Ill. App. 185.

It was improper to show that the spouts were removed by the city immediately after the accident. The city had the right to cut the spouts off after the accident, and the same could not be used against it on the trial. *Hodges v. Percival*, 132 Ill. 53; *Shinners v. Proprietors of Locks, etc.*, 28 N. E. Rep. (Mass.) 10; *Corcoran v. Peekskill*, 108 N. Y. 151; *Nalley v. Carpet Co.*, 51 Conn. 524; *Railroad Co. v. Clem*, 123 Ind. 15; *Hudson v. Railway Co.*; 59 Iowa, 581.

T. C. KERRICK and SAIN WELTY, of counsel.

J. P. LINDLEY, city attorney.

APPELLEE'S BRIEF.

Appellant's complaint is *res indicata* under the rule of our

Supreme Court, that it is too late to question the merits of a case when that issue has been once settled by the Court of Appeals. *Smith v. Brittenham*, 94 Ill. 624; *Rising v. Carr*, 70 Ill. 596.

It was not error to permit appellee to show that other accidents had occurred on account of these fountain spouts. *City of Chicago v. Powers*, 42 Ill. 173; *Ottawa Gas Co. v. Graham*, 35 Ill. 346; *C. & N. W. Ry. v. Hart*, 22 Ill. App. 207-210; *City of Aurora v. Brown*, 12 Ill. App. 122-131; *District Columbia v. Armes*, 107 U. S. 525; *G. T. R. R. Co. v. Richardson*, 91 U. S. (1 Otto), 470; *Delphi v. Lowrey*, 74 Ind., top p. 524; *City Topeka v. Sherwood*, 39 Kas. 695-696; *Morse v. M. & St. L. Ry. Co.*, 30 Minn. 471-472; *City Ft. Wayne v. Coombs*, 107 Ind. 87-88. Also: *Quinlan v. City Utica*, 11 Hun (N. Y.), 217; *Kent v. Town Lincoln*, 32 Vt. 591-597; *Walker v. Westfield*, 39 Vt. 250; *House v. Metcalf*, 27 Conn. 636; *Hoyt v. Jeffers*, 30 Mich. 190; *Darling v. Westmoreland*, 52 N. H. 403-404; *Smith v. O. C. & N. R. R. Co.*, 10 R. I. 27.

JAMES S. EWING and JOHN T. LILLARD, attorneys for appellee.

OPINION OF THE COURT.

This case was here at a former term, 40 Ill. App. 185. The last trial resulted in a verdict for plaintiff for one thousand dollars, upon which the court rendered judgment, from which the city has prosecuted an appeal. Complaint is made that the court allowed plaintiff to prove other accidents, without proof that the fountain was in the same condition as when the deceased was hurt, and in one or more instances when the witness said the condition was different.

The change consisted in removing the elbows from the ends of the projecting spouts. How far this worked a material and substantial change was a question of fact and it was for the jury to say whether the fountain continued dangerous after the change. It seems quite clear that

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these elbows were removed before the accident in question, though the time when this was done is not exactly shown. According to the evidence of Alderman Smith, it was shortly after the middle of August, and the accident occurred on the 10th of September, while at least two witnesses for plaintiff testify the elbows were there as late as a week or ten days before the accident. If the evidence of previous accidents was admitted as tending to show the condition was dangerous, it would, of course, be necessary to show the condition was substantially the same.

If the object was to establish notice to the city, somewhat different considerations are involved. From the fact that accidents frequently occurred, the city would be presumed to know that there was danger, and therefore it was called upon to obviate the difficulty and remove the cause of trouble. If it made an effort in that direction it would still be a question of fact as to how much diligence was shown and what was thereby accomplished. If, such notice having been received, the city made a change that proved insufficient to remedy the evil, it would also be a question of fact as to how far proper judgment and caution had been used, and whether due care had been taken to ascertain that the change was efficient for the purpose.

Unless the court could judicially say that the removal of the elbows did substantially and materially change the situation, it could not entirely exclude the offered evidence as to such other accidents. It appears that in every instance where the objection was made, the court distinctly ruled in the presence of the jury, that proof of accidents when the condition was different from that when the deceased was hurt should not prejudice the city, and the evidence was admitted with that qualification, and that the jury were to determine whether the conditions were like or unlike; and in the sixth instruction given for the defendant the jury were advised in plain terms that they were not to regard any testimony as to accidents at times when the spouts were in a condition materially different from that at the time of the accident causing the injury complained of, and that the

question was, what was the condition of the fountain and spouts at that time?

Thus it seems that the court was careful to impress upon the jury that, unless the fountain at the time of the accident to the deceased was dangerous, the city was not liable. After fully considering the proofs in the light of the rulings of the court when admitting the evidence, and of the very elaborate instructions given at the instance of the defendant, we are convinced that there was no occasion for the jury to be in doubt, much less to be misled on this point. It is urged, also, that the court erred in allowing proof that the city made another change by sawing the spouts off, after the deceased was hurt.

This came out upon the cross-examination of the witness Popple. After the plaintiff had examined him in chief, the attorney for the city proceeded to cross-examine him as to the condition of the spouts before the accident, and in answer to the fifth of these questions, he repeated the statement that he did not remember when the change by removing the elbows was made, but he did remember that after the accident the spouts were cut off.

Counsel for the city moved to exclude this answer, but the court overruled the motion.

No exception was saved to this ruling and the cross-examination proceeded. Afterward, on re-direct examination, counsel for plaintiff asked witness when the spouts were sawed off, and repeated the question, eliciting the reply that it was after the accident. The record shows that counsel for defendant objected, but being overruled, saved no exception, so that the strictly considered point can not now be urged.

As was said in *Hodges v. Percival*, 132 Ill. 58, "evidence of precautions taken after an accident is apt to be interpreted as an admission of negligence," and should not be admitted; but as was also said in that case, it is not every error committed by a trial court that will justify a reversal of the judgment.

The jury were distinctly instructed that unless they found the spout was not reasonably safe at the time of the acci-

dent, the plaintiff could not recover, and in view of all the evidence we feel that it would not comport with justice to reverse this judgment on this point alone if it were fairly before us.

Objection is urged to the action of the court in giving the second and also the last instruction for the plaintiffs. As to the second instruction the point made is, that it required the city to make the fountain *safe*, when a reasonable degree of safety is all the law prescribes—meaning to say, probably, that a reasonable effort to make it safe was all that was necessary. On turning to the instruction we think it so worded, when all read together, as to signify just what counsel think it should, and that the use of the word “safe” is in such a connection when not so read as to limit rather than extend the city’s duty—so that there was in that respect nothing of which the city can complain. As to the last instruction the point is, that it singled out and gave undue prominence to the matter of the spouts, and ignored other important facts, and particularly that it omitted reference to the duty of the deceased to exercise due care.

We think this criticism too refined. The clear object of the instruction was not to state the grounds of liability. Nothing of the sort was assumed, but its whole scope was, that if the spout was dangerous at the time of the accident, and was known to be so by the city, or might have been, etc., etc., then the fact of removing the elbows at some previous time would not relieve the city.

An objection is made, also, as to the modification of the defendant’s sixth instruction. The record fails to show that the court did, in fact, modify said instruction. The brief contains a statement that the last sentence was added by the court. If so, we can not see that the defendant was injured, as the addition seems only to strengthen the point already stated, and to make the proposition more emphatic. It does not assume or lead to the inference, as counsel seems to argue, that it was the only point in the case, and does not bear that construction.

It is urged, finally, that the fountain was in a reasonably safe condition.

We have carefully examined the abstract, and have read from the record whenever there seemed occasion to do so, and while it may be conceded that practical men might reach opposite conclusions on the main questions of fact, yet we think there is enough to support the view that the condition of the spouts was the proximate cause of the injury; that the city had knowledge thereof, and was negligent in that regard, and that the deceased exercised ordinary care.

At least the tendency of the proof on all these points is so strong, that according to well established rules, we can not interfere with the judgment on that ground. Affirmed.

Coates v. Mernin.

1. *Verdict Against the Weight of the Testimony.*—A verdict against the preponderance of the evidence set aside.

2. *Contracts—Conditional.*—In an action for the price of a boiler, it was contended on the part of the defendant that the sale was conditional; that if the plaintiff would clean the boiler thoroughly, subject it to a water test of 150 to 200 lbs., paint it and deliver it at his factory, he would accept it and pay \$200. The boiler was not subjected to the test but was delivered at the factory in the defendant's absence, and the question whether or not the contract of sale was conditional upon the making of such test was practically the contention between the parties. Plaintiff was permitted to prove that the defendant's son, at a time when the defendant was not present, offered to sell the boiler for \$200, and said it was a good boiler; this the son denied. It was held that the admission of this testimony was error. The court can not know that the denial by the son overcame the prejudicial effect of the incompetent evidence; the existing relationship of the son may have operated to deprive his testimony of full weight as against that of a disinterested witness.

3. *Contracts—Conditional.*—Upon the trial of an issue as to whether a contract of sale is conditional, it is error to admit testimony for the purpose of showing the condition of the article sold, as to its soundness, safety, material composed of, and value. The tendency of such evidence is to divert the mind of the jury from the real issue between the parties, such matters not being in issue.

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4. *Instructions—Assumption of Facts not Admitted.*—On the trial of an issue as to whether a contract of sale is conditional, it is error to instruct the jury that it is incumbent upon the defendant to establish, by a preponderance of the evidence, a warranty claimed and a breach of such warranty, because the instruction practically assumes that the defendant purchased the property and was defending upon the ground of a warranty, etc.

5. *Instructions Must Be Consistent with the Issue upon Trial.*—On the trial of an issue as to whether a contract of sale is conditional, instructions which deal with the law, concerning false affirmations and fraudulent representation, and advise the jury that they can not avail the defendant unless made under circumstances calculated to deceive an ordinarily prudent person, and to warrant the rescission of a contract, such representations must be both false and fraudulent, are improper, as tending to mislead the jury, and, moreover, as seeming to imply that the plaintiff had contracted for the property, and was seeking to avoid a judgment for the price, upon the ground that he had been induced to make the purchase by false and fraudulent representations.

Memorandum.—Action upon a contract. Appeal from a judgment in favor of the plaintiff, rendered by the Circuit Court of McLean County: the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 31, 1892.

Plaintiff's instructions, nine, ten and eleven:

9. In this case it is incumbent on the defendant to establish by a preponderance of the evidence, the warranty alleged or claimed, and also a breach of such warranty; and if, after carefully considering all the evidence in the case, you find the weight of the evidence is with the plaintiff upon either of these points, or is equal in weight to that of the defendant regarding either the warranty or the breach of it, then as a matter of law you should find in favor of the plaintiff upon the question of warranty.

10. You are instructed, that in order that representations may be regarded as fraudulent, so as to be a ground for rescinding a contract, they must be both false and fraudulently made. If they are made with an honest belief of their truth, at the time, they are not fraudulent.

11. You are instructed that every false affirmation does not amount to a fraud. If, by an ordinary degree of caution, the party claiming could have ascertained the truth or falsity of the representations complained of, then such party is not entitled to a verdict on that ground; and in this case, in order that the defendant may avail himself of the defense of fraud set up, you must believe from the evidence, not only that the representations complained of were made, but also that they were made under circumstances calculated to deceive a person acting with reasonable and ordinary prudence and caution; and in determining this question, the jury should consider all the circumstances under which the alleged misrepresentations appear, from the evidence, to

have been made, and whether, under the circumstances, the representations made were such as a person of common or ordinary prudence would or should have relied upon, or such as would be likely to mislead such a person.

The opinion of the court states the case.

KERRICK, LUCAS & SPENCER, attorneys for appellant.

BENJAMIN & MORRISSEY, attorneys for appellee.

OPINION BY THE COURT.

The appellee, in the Circuit Court, recovered a judgment against the appellant for the price of a boiler, which the appellee claimed he had sold and delivered to the appellant. The appellant denied that he had bought the boiler, and asserted that the appellee hauled it to his premises when he was absent, and there left it. That it was not otherwise delivered, and that he did not accept it. The parties agree that they had a conversation concerning the purchase and sale of the boiler, at the water works office in Bloomington, but that a bargain was not there consummated. The appellee contends that he met the appellant at his (the appellant's) place of business the next day after the meeting at the water works office, and that the appellant offered to pay, and he consented to take, \$200 for the boiler, delivered at appellant's factory in Bloomington, and that he had the boiler delivered in pursuance of the contract. The appellant contended and testified that he was not in Bloomington on the day after the talk at the office of the Water Works Company, but was in Galesburg, and that prior to his departure he directed his son, L. E. Coates, and a Mr. Stough, to tell the appellee that if he would clean the boiler thoroughly, subject it to a water test of 150 to 200 lbs., paint it and deliver it at his factory, he would accept it, and pay \$200 for it. Appellee's son, L. E. Coates, testified that he delivered his father's message to the appellant.

The boiler was not subjected to a test by water, and whether or not the contract was conditional upon the making of such test was practically the contention between the parties.

Upon this issue the only competent evidence in behalf of the appellee was his own testimony, which was met and directly contradicted by the testimony of the appellant, his son, L. E. Coates, and of M. F. Burkett. The latter testified that he was present and heard L. E. Coates tell the appellee that his father (the appellant) would take the boiler at \$200, if it was cleaned out, given a water pressure test, painted and delivered, and that the appellee accepted the offer. The preponderance of evidence seems to us against the appellee.

No attempt was made to impeach any of the witnesses, and we perceive no reason why such a preponderance of numbers should not have prevailed. The appellee was permitted to prove that L. E. Coates, the son, at a time when the appellant was not present, priced the boiler to a Mr. Washburn at \$200, and practically offered to sell it for that sum, and said that it was a good boiler. This was, we think, error. True, the son denied that he offered the boiler for sale or that he said it was a good boiler, but we can not know that this overcame the prejudicial effect of the incompetent testimony. The existing relationship of the son may have operated to deprive his testimony of full weight as against that of a disinterested witness.

The appellee was allowed, over the objection of the appellant, to introduce testimony tending to show, and for the purpose of showing, that the boiler was safe; that it had been used only about six years, during which time it had been washed once in each two weeks; that it was made of steel, and other testimony intended and having a tendency to show that it was a good, safe boiler, and probably worth the amount sought to be recovered for it.

This proof was, we think, improper. If the appellant offered to buy it only on condition that it should be first subjected to a certain test, the appellee could not substitute for that test the opinion of witnesses that it would stand the test and was a good, safe boiler and worth the price asked for it. The tendency of such evidence was to divert the mind of the jury from the real issue between the parties and to induce them to find for the plaintiff, because the boiler

appeared to be worth all the defendant was asked to pay for it. The value of the boiler, or whether it was safe or made of steel or iron, was not in controversy.

The instructions given the jury on behalf of the appellee are jointly open to criticism. The 9th of such instructions tells the jury that it is incumbent on the appellant to establish, by a preponderance of evidence, the warranty claimed, and also a breach of such warranty, and that if the evidence is equally balanced as to either the warranty or the breach of it, the verdict must be for the appellant upon the question of warranty.

This instruction practically assumes that the appellant admitted that he had purchased the boiler, but was defending upon the ground that the appellee had warranted it, and that the warranty had failed, while in fact the sole contention of the appellant was that he had not bought the boiler.

Instructions Nos. 10 and 11 are equally objectionable. They deal with the law concerning false affirmations and fraudulent representations and instruct the jury that such representation can not avail the appellant as a defense unless they were made under circumstances calculated to deceive an ordinarily prudent person, and that to warrant the rescission of a contract such representations must be both false and fraudulent.

The appellant was not attempting to rescind a contract because of fraudulent representations, but was vigorously denying that a contract had been consummated.

These instructions were likely to mislead the jury, and moreover seemed to imply that the appellant had contracted for the boiler, and was seeking to avoid a judgment for the purchase price upon the ground that he had been induced to make the contract for it by false and fraudulent representations concerning it.

We think the errors indicated are such as to demand the reversal of the judgment. It is therefore reversed and the cause remanded.

Schlink v. Maxton.

Schlink v. Maxton.

1. *Power of the Court over its Judgments after Adjournment.*—The rule that a judgment can not be opened by the court rendering it, for any cause, after the close of the term at which it is rendered, does not apply to courts of equity, where the ground for opening such judgments is fraud or mistake.

2. *Equitable Jurisdiction of the County Court.*—The County Court has equitable jurisdiction in respect to all matters pertaining to the settlement of estates, and in a proper case it may set aside an allowance of a claim after the close of the term at which it was allowed, and requires the parties to proceed *de novo*, and such a case is presented when it appears that fraud or mistake has intervened so that a court of equity, if the facts were before it, in a bill to set aside a judgment, would entertain jurisdiction.

Memorandum.—Writ of error to reverse the judgment of the Circuit Court of McLean County in sustaining a demurrer to a petition for a writ of *certiorari*; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and the judgment affirmed. Opinion filed October 31, 1892.

STATEMENT OF THE FACTS BY THE COURT.

The plaintiff in error presented to the Circuit Court of McLean County a petition for a common law writ of *certiorari*, alleging that petitioner was the executor of the estate of Valentine Schlink, deceased, that he presented a claim against said estate in due form and properly verified by his affidavit on the 20th of July, 1891, during the July term of the County Court, and asked that court for an adjustment of his said claim, and the court then and there appointed John J. Pitts temporary administrator to appear for the estate, and thereupon the matter of said claim was submitted to the court and an allowance was made in favor of petitioner for \$594.60, as of the seventh class, and that no motion for new trial or for appeal was made nor any further proceedings were had in the matter at said July term, but that afterward and during the following August term of said court, one of the heirs of said Valentine Schlink entered a

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motion to set aside the claim so allowed, and the court made an order, as follows:

“And now the said Valentine Schlink (petitioner), being present by his attorney, and the court having considered said motion and the affidavits filed in support thereof, and having heard the arguments of counsel and being fully advised in the premises, doth sustain the motion. It is therefore ordered and adjudged by the court that the judgment heretofore entered in favor of said Valentine Schlink for the sum of five hundred ninety-four dollars and sixty cents against the estate of Valentine Schlink, deceased, be and is hereby set aside.”

To which order petitioner then and there excepted, and being advised that said order was without jurisdiction in the County Court he prayed for said writ of *certiorari* to the end that said record having been inspected, etc., it might be set aside, etc., etc.

The Circuit Court sustained a demurrer to the petition and dismissed the same, to which action petitioner excepted and now brings the record to this court, and assigns error upon said ruling of the Circuit Court.

PLAINTIFF'S BRIEF.

When a court of general common law jurisdiction enters a judgment, having jurisdiction of the parties and subject-matter, and no exception is taken, no motion for a new trial entered, and no appeal prayed for or allowed, and the court adjourns for the term, that is the end of the matter, and the court entering the judgment, neither of its own motion nor on the motion of a party thereto, could set the same aside. *Cook v. Wood*, 24 Ill. 295; *Windett v. Hamilton*, 52 Ill. 180; *Coursen v. Hixon*, 78 Ill. 339; *County of Cook v. Canal*, etc., 131 Ill. 509.

All the reasons and analogies of the law, as they seem to us, indicate that the judgment of a County Court in such a case is, so far as this question is concerned, the same as a judgment of the Circuit Court. *Propst v. Meadows*, 13 Ill. 157; *Mitchell v. Mayo*, 16 Ill. 84; *Gould v. Bailey*, Penn.

Schlink v. Maxton.

(N. J. L.) 1; Housh v. People, 66 Ill. 181; Darling v. McDonald, 101 Ill. 377; Durham v. Field, 30 Ill. App. 121.

The rule is thus laid down by Woerner: the orders, decrees and judgments of Probate Courts, in so far as they are courts of record, can be known by their records alone, which necessarily import verity, and can neither be questioned nor falsified, from which it follows that the court is bound by its own record and can neither change nor disregard its orders, judgments, or decrees after the lapse of the term at which they are rendered. American Law of Administration (Woerner), Sec. 146; Johnson v. Johnson, 26 Ohio St. 357; Alexander v. Nelson, 42 Ala. 462; Bryant v. Horn, 42 Ala. 496; Wolf v. Banks, 41 Ark. 104; State v. Probate Court, 33 Minn. 94; Browder v. Faulkner, 82 Ala. 257.

KERRICK, LUCAS & SPENCER, attorneys for plaintiff in error.

DEFENDANT'S BRIEF.

In the allowance of claims, a Probate Court is intrusted with large and comprehensive jurisdiction; it may exercise large equity powers in adjusting claims and settling estates. American Law of Administration (Woerner), Vol. I, page 340, and cases cited in note 3.

Our Supreme Court, in numerous cases, has upheld this doctrine. Hurd v. Slaten, 43 Ill. 350, and the cases there cited; Millard v. Harris, 119 Ill. 185; Hales v. Holland, 92 Ill. 494. Appeals are allowed from all final orders from the Probate Court to the Circuit Court, and a trial *de novo*. Rev. Stat., Chap. 37, page 240.

The matter of the allowance of this claim is now pending.

STEVENSON & EWING, and A. M. CAVAN, attorneys for defendant in error.

OPINION BY THE COURT.

The question is, whether the petition shows such want of jurisdiction in the County Court, as to render the order

subject to be set aside upon a writ of *certiorari*. The argument is, that the allowance of the claim was a judgment, which could not be opened by the County Court for any cause after the close of the July term. It is not insisted that that judgment could not be opened by a court of equity for fraud or mistake, but that the County Court had no power to grant such relief.

We are of opinion that the County Court has such equitable jurisdiction, in respect to all matters pertaining to the settlement of estates, that it may in a proper case set aside an allowance, and require the parties to proceed *de novo*. Such a case would be presented when it appeared that fraud or mistake had intervened, so that a court of equity, if the facts were before it, in a bill to set aside the judgment, would entertain jurisdiction. This seems to follow from the doctrine repeatedly announced, that the County Court, in the settlement of estates, is vested with equitable, as well as legal powers. *Millard v. Harris*, 119 Ill. 198. We understand this power of the County Court relates not only to the consideration of equitable demands, but to the employment of such equitable methods as are consistent with its organization and modes of proceeding. For instance, it may correct mistakes in reports of executors, administrators and guardian, and make such final settlements in respect thereto as may be equitable.

So here, although the term of court at which an allowance was made, has passed, it may, for such cause as would move a court of equity, upon a bill filed, entertain a motion to set aside the allowance.

No inconvenience or hardship can follow from the due exercise of this equitable power.

If it has the power to do this in any case, then there is jurisdiction of the subject-matter, and the writ of *certiorari* will not lie for mere error in the exercise thereof.

It appears in the present case there was also jurisdiction of the person, and the only objection taken is, that the subject-matter was beyond the power of the County Court.

There seems to be great propriety, and even necessity, in

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permitting that court to open an allowance whenever it finds that fraud or mistake has occurred. There is nothing to prevent a proper exercise of equitable considerations upon a motion. The court may hear evidence, and sift the matter with as much care and accuracy as though the proceedings were in chancery, and the rights of parties may be adjusted more speedily than would be possible if resort were had to that tribunal.

The judgment will be affirmed.

Edwards v. Dillon.

1. *Parties—Power of One Partner to Bind the Firm by Deed.*—The rule of law in force in this State is that partners can not bind the firm by deed, and ordinarily, a partner, in making and signing such an instrument of writing in the firm name, binds himself only and not the firm.

2. *Ibidem—Previous Parol Assent.*—It is the rule in this State that, if the other partners give their parol assent previous to the execution of a writing that it should be under seal, it will bind them though they are absent when it is signed.

3. *Seal—Partnership Contract—Surplusage.*—An instrument which will be just as effective without a seal as with one for the purpose intended, and the contract in the instrument being within the power of a partner to make, and binding on the firm, had the seal been omitted, the seal will not vitiate the instrument, if otherwise valid, as to all members of the firm.

Memorandum.—Pleas in abatement. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 31, 1892.

APPELLEE'S STATEMENT OF FACTS.

Though the declaration in this case counts upon a sealed instrument, the action is brought in assumpsit. Appellee pleaded in abatement the non-joinder of his four partners. Appellant took issue by a traverse upon this plea; and the issue tried below was whether or not the contract declared

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147	14

upon was the contract of Levi Dillon & Sons, or the contract of Levi Dillon alone. The jury found it to be the contract of the firm; and from the judgment rendered on this verdict, appellant, Edwards, prosecutes an appeal.

Contract referred to in the opinion:

“This is to certify that Levi Dillon & Sons have this day sold to B. Edwards, of Chicago, Ill., the imported Norman stallion, Cambrone, for the sum of eighteen hundred dollars. We warrant the said stallion sound and healthy, but assume no responsibility on account of disease or accident after this date.

“We guarantee that the said stallion, with proper handling, shall prove to be an average foal getter. In case said stallion shall fail to get colts, we agree to exchange him for a stallion of equal merits, and to pay half the expense incurred in making said exchange. Said stallion shall have a fair trial for two years before being condemned as a breeder. Cambrone was foaled in France, in 1880, and imported to the United States by Dillon Brothers, in 1883. Cambrone is recorded in the National Register of Norman horses, No. 2081.

“In witness whereof, we have hereunto set our hands and seal this thirtieth day of January, 1884.

“LEVI DILLON & SONS.” [SEAL]

APPELLANT'S BRIEF.

An action on a contract under seal, signed and sealed by one partner, in the name of the firm, though made in the course of partnership business and for a partnership liability, is the sealed instrument of the individual partner signing the same, and the action must be brought against him alone. *Eames v. Preston*, 20 Ill. 389; *Harrison v. Jackson*, 7 I. R. 207; *Walsh v. Lennon*, 98 Ill. 27; *Story on Partnership*, Secs. 119 and 122 and note 3; *Anderson v. Tompkins*, 1 Brock. 456, 462; *Collyer on Partnership*, Sec. 671 and notes; *Gates v. Graham*, 12 Wend. 53; *Armstrong v. Robinson*, 5 Gill & Johns. 412; *Dunlap's Paley on Agency*, 157 and note; *Clement v. Brush*, 3 Johnson's Cases, 180; *Morris v. Jones & Spencer*, 4 Harrington (Del.), 428; *Nunnely v. Doherty*, 1 Yerger, 26; *Sibley v. Young* (S. Car.), 2 S. E. Rep. 314; *Girard v. Basse*, 1 Dallas, 119.

The authorities seem to be uniform that the one partner who signs and seals in the firm name may be sued alone on the sealed instrument. But some of the authorities hold

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that all the other members are also liable on the instrument, if they authorized the one partner to seal the contract by an instrument under seal, but not otherwise. *Eames v. Preston*, 20 Ill. 389; *Harrison v. Jackson*, 7 T. Rep. 207; *Nunnely v. Doherty*, 1 Yerger, 26; *Trimble v. Coons*, 2 A. K. Marshall, 375.

Other authorities go further, and hold that the other partners are liable on the sealed instrument, if they expressly authorized (though not under seal) the one partner to seal for them, or if they expressly ratified the contract under seal after it had been made. *Sibley v. Young*, 2 S. E. Rep. 214.

We also claim that the alleged partners of the defendant were dormant or secret partners, unknown to the plaintiff, and plaintiff therefore had the option to join them as defendants or not, as he saw fit. *Collyer on Partnership*, Sec. 719; *Story on Partnership*, Sec. 241; *Ex parte Norfolk*, 19 Vesey R. 455. Proof of the existence of secret or dormant partners will not support the plea of abatement, unless it also appears that plaintiff had knowledge of the fact at the time of the contract. 2 *Greenlf. Ev.*, 25 and 134; *Goggin v. O'Donnell*, 62 Ill. 66.

OSCAR M. TORRISON and KERRICK, LUCAS & SPENCER, attorneys for appellant.

APPELLEE'S BRIEF.

Partnership engagements are joint only; all who were partners at the date of the contract must be joined; each partner is entitled to have the judgment go against all; and a partner, sued singly, can only avail himself of these rules by a plea in abatement. *Bates on Partnership*, Sec. 1049; *Page v. Brant*, 18 Ill. 37; *Puschel v. Hoover*, 16 Ill. 340; *Pearce v. Pearce*, 67 Ill. 207.

While the general rule of the common law still prevails, that a partner has no implied power to bind his co-partner by a sealed instrument, yet the following modification of that rule is now recognized: If the act be one which

would be valid and effective without a seal, the addition of a seal by the signing partner does not vitiate it; and the seal may in such case be treated as surplusage. *Sterling v. Bock*, 40 Minn. 11; *Alexander v. Alexander*, 85 Va. 353; *Robinson v. Crowder*, 4 McCord, 287; *Human & Co. v. Cuniffe & Co.*, 32 Mo. 316; *Tapley v. Butterfield*, 1 Met. (Mass.) 515; *Everit v. Strong*, 5 Hill (N. Y.), 163; *Milton v. Mosher*, 7 Met. (Mass.) 244; *Dubois' Appeal*, 2 Wright (Pa.), 231; *Deckerd's Case*, 5 Watts (Pa.), 342; *McCullough v. Summerville*, 8 Leigh, 415; *Forkner v. Stewart*, 6 Grattan, 197; *Lucas v. The Bank of Darian*, 2 Stewart (Ala.), 280; *Mechem on Agency*, Sec. 141.

One partner may bind his co-partner, within the scope of the partnership, by a sealed contract, if such act be either previously authorized, or subsequently ratified by the other partners; and such authority or ratification may be by parol, and may be inferred by a jury from the acts of the parties, or from the course of the business. *Peine v. Weber*, 47 Ill. 41; *Wilcox v. Dodge*, 12 Brad. 517; *Walsh v. Lennon*, 98 Ill. 27; *Hier v. Kaufman*, 134 Ill. 215; *Cady v. Shepherd*, 11 Pick. (Miss.), 400; *McDonald v. Eggleston*, 26 Vt. 154.

The presumption is, where a firm name is signed to a sealed instrument by one of the partners, that the partner so signing had authority to execute the instrument under seal. *Lambden v. Sharp*, 9 Humph. (Tenn.) 224; *Alexander v. Alexander*, 85 Va. 353; *Remington v. Goodrich*, 5 Wis. 138; *Hier v. Kaufman*, 134 Ill. 215.

Under the evidence in this case, all the four partners named in the plea in abatement were ostensible partners.

To constitute a dormant partner, three things are necessary: (1) He must take no active part in the business. (2) His name must not appear in the title of the partnership. (3) He must be unknown to those who lend credit to the firm. *Bates on Partnership*, Secs. 151 and 152.

A dormant partner is one "whose name and transactions as a partner are professedly concealed from the world." *Bouvier's Law Dictionary*, title "Dormant."

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The word "dormant" implies both secrecy and inactivity. Parsons on Partnership, page 34, note P.

Partners who are represented in the firm style by the words "& Co." are not dormant, but ostensible partners. Podrasnik v. Martin, 25 Ill. App. 300; Goddard v. Pratt, 16 Pick. (Mass.) 428; Deford v. Reynolds, 36 Pa. St. 325.

Ignorance of the creditor who deals with the firm does not constitute a partner dormant as to him.

MESSRS. DEFFORD & REYNOLDS and PHILLIPS & PORTER,
attorneys for appellee.

OPINION BY THE COURT.

The appellant brought assumpsit against the appellee to recover damages for a breach of warranty contained in an instrument in writing set out in the declaration.

That instrument included evidence of a sale of a horse, and contained a warranty as to the qualities of the animal, and was signed "Levi Dillon and Sons. [SEAL.]"

The appellant assumed that Levi Dillon alone was liable, as a matter of law, on this instrument—he having signed it.

The appellee filed his plea in abatement alleging that the supposed promises in the declaration mentioned were made by a firm of partners, composed of Levi Dillon, John Harding, James Railsback, Ellis Dillon and James C. Duncan, all of whom were still living, and that the horse named in the instrument set out in the declaration was at the time of the sale thereof, the property of said partnership, and not the separate property of said Levi Dillon.

The plaintiff (appellant) filed his replication denying the plea, and upon the issue thus made the case went to a trial by jury, resulting in a verdict, and judgment thereon, in favor of defendant, the appellee, to reverse which the plaintiff, appellant, has brought the record here by appeal.

The only question is upon the rulings of the court in admitting evidence of the partnership and of the circumstances attending, and preceding the execution of the said instrument in writing and in giving and refusing instructions on the same subject.

It appears from the proof that said firm of Levi Dillon & Sons was engaged in the business of importing and selling Norman horses; that in making sales it was necessary to warrant the qualities of the particular animals sold; that the firm had prepared a printed form to be used in such cases, for a bill of sale without such warranty; that this was bound in books or pads containing forty or fifty sheets; that all the members of the firm were familiar with this form; that it was customary to use it in all cases where sales were made, and that whichever member of the firm made a sale, he would give the purchaser a bill of sale and warranty on one of these blanks, signing the firm name, Levi Dillon & Sons; that it was understood this would be done in all such cases; and that Levi Dillon made the sale and executed the instrument in this case, as, in fact, he did in most cases. The appellant objected to this proof, and insists now that it was not relevant or sufficient to support the plea. We think otherwise. It may be admitted that it is the rule in this State that partners can not bind the firm by deed; and ordinarily a partner, in making and signing such an instrument of writing in the firm name, binds himself only, and not the firm.

But it is also the rule in this State that if the other partners gave their parol assent previous to the execution of the writing, that it should be under seal, it would bind them, though they were absent when it was signed. *Wilcox v. Dodge*, 12 Brad. 517; *Peine v. Weber*, 47 Ill. 41; *Walsh v. Lennon*, 98 Ill. 27.

Tested by this rule, it is clear that there was evidence enough to show that the instrument here involved was binding on all the members of the firm.

It is apparent also that this instrument would have been just as effective without a seal for the purpose intended, and there are many authorities in support of the position that in such case, when the contract in the instrument is within the power of a partner, it would be binding on the firm, had the seal been omitted. The seal shall not vitiate such an instrument, otherwise valid as to all the firm. Story on

Tuttle v. Nat. Bk. of Republic.

Partnership, Sec. 122, and citations found in the principal opinion in *Walsh v. Sinnon, supra*.

While this view of the matter seems to be very persuasive and forcible, it is perhaps in advance of the rule as it is to be gathered from the adjudications in this State.

We are of opinion the judgment of the Circuit Court should be affirmed.

Tuttle v. National Bank of Republic.

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1. *Transfer of Stock in an Insolvent Corporation.*—When there is sufficient in the proof to warrant the conclusion that a transfer of stock is merely colorable and for the distinct and fraudulent purpose of avoiding a liability as a stockholder, a finding to that effect will not be disturbed.

2. *Liability of Stockholders in a Corporation of Another State.*—In questions touching the liability of persons holding stock in a bank of another State, for the debts of the bank in case of its insolvency, the courts of this State will follow the construction placed by the courts of the State where the bank is located, upon the constitution and statute under which the bank is organized.

Memorandum.—Action upon a stockholder's liability. Appeal from a judgment rendered by the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 31, 1892.

APPELLEE'S STATEMENT OF THE CASE.

This was an action of assumpsit brought by appellee against appellant as a stockholder of the Edwards County Bank, of Kinsely, Kansas, to recover \$3,000, on account of his individual liability as a stockholder of the bank, the bank being insolvent and indebted to appellee.

The material facts in the case, of which there is no dispute, are the following:

The Edwards County Bank was organized September 8, 1882. December 30, 1885, appellant and his brother, W. W.

Tuttle, of Springfield, Mo., each purchased thirty shares of the capital stock of the Edwards County Bank, each paying \$3,000 therefor; March 26, 1890, appellee loaned the Edwards County Bank \$5,000; December 3, 1890, appellee brought suit on that against the Edwards County Bank; January 13, 1891, appellee recovered judgment for \$5,111 and costs of suit, against the Edwards County Bank, on which execution issued and was returned *nulla bona*, February 28, 1891. B. F. Tatum brought suit against the Edwards County Bank, on the 14th of November, 1890, and at his suit, a receiver was appointed November 17, 1890, and in the same suit judgment dissolving corporation was rendered January 14, 1891. Appellant and W. W. Tuttle claim to have sold their stock to Marzetta, October 7, 1890.

J. S. EWING, of counsel.

A. E. DEMANGE, for appellant.

APPELLEE'S BRIEF.

Before there can be a remedy in any case, there must be a right. The real question involved in this case, so far as that point is concerned, is, taking the whole body of the laws of the State of Kansas, *i. e.*, the constitution, statutes, and the decisions of the Supreme Court of Kansas construing the constitution and the statutes, then the question is, was there a right? It must be admitted that the Supreme Court of Kansas is the final and only arbiter as to the true meaning and proper interpretation of the constitution and the statutes of Kansas. All the cases so hold. *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Shelby v. Guy*, 11 Wheat. (U. S.) 367; *Christy v. Pridgeon*, 4 Wall. (U. S.) 196; *Town of South Ottawa v. Perkins*, 94 U. S. 267; *Chase v. Curtis*, 113 U. S. 452; *Hoyt v. Thompson*, 3 Sandf. (N. Y.) 416; *Union National Bank v. Bank of K. C.*, 136 U. S. 223; *Jessup v. Carnegie*, 80 N. Y. 441; *Savings Association v. O'Brien*, 51 Hun (N. Y.), 45; *Lane v. Watson*, 51 N. J. Law, 186; *Fitzgerald v. Mo. P. R. R. Co.*, 45 Fed. Rep. 812;

Howe v. Mo. P. R. R. Co., 45 Fed. Rep. 812; How v. Walch, 14 Daly (N. Y.) 80; Cook on Stockholders, 243, note 1.

When a person becomes a stockholder in a corporation organized under the laws of a foreign State, he contracts with reference to the laws of that State, and his liability as a stockholder is to be determined with reference to the laws of that State. Flash v. Conn, 109 U. S. 371; Abbey v. Dry Goods Co., 44 Kan. 416; Howell v. Manglesdorf, 33 Kan. 194; Perry v. Turner, 55 Mo. 418; Aultman's Appeal, 98 Pa. St. 505; Shafer v. Moriarty, 46 Ind. 9; Hill v. Beach, 12 N. J. Eq. 31; Crease v. Babcock, 10 Met. (Mass.) 525; Seymour v. Sturgess, 26 N. Y. 134; Ohio Life Ins. Co. v. Merchants, 11 Humph. (Tenn.) 1; Payson v. Withers, 5 Biss. (U. S.) 269; Pettibone v. McGraw, 6 Mich. 441; Lawrie v. Inmann, 46 N. H. 119; First Natl. Bank v. Gustin, 42 Minn. 327; 2 Morawetz on Private Corporations, Sec. 874-902; Patterson v. Lynde, 106 U. S. 519; Patterson v. Lynde, 112 U. S. 196; Cook on Liability of Stockholders, Sec. 243.

And, in the absence of legislation to the contrary, the proper way of enforcing such liability, is by an action at law. Corwith v. Culver, 69 Ill. 502; Fuller v. Ledden, 87 Ill. 310; McCarthy v. Lavasche, 89 Ill. 270; Hull v. Burtis, 90 Ill. 213; Eames v. Doris, 102 Ill. 350; Buchanan v. Meisser, 105 Ill. 638; Thompson v. Meisser, 108 Ill. 359; Thebus v. Smiley, 110 Ill. 316; Root v. Sinnock, 120 Ill. 350; Schalucky v. Field, 124 Ill. 620; Morawetz on Corporations, Sec. 910; Cook on Liability of Stockholders, Sec. 243.

No doubt but when a suit is brought against a director or trustee for the benefit of the creditors, it must be in equity. Homer v. Henning, 93 U. S. 228; Morawetz on Corporations, Sec. 910; Richardson v. Akin, 87 Ill. 138; Harper v. Union Mfg. Co., 100 Ill. 225.

The relation between a bank and depositor is always that of a debtor and creditor. Morse on Banking, Sec. 289 (3d Ed.). And that was the relation between the appellee and

the Edwards County Bank, and the statute expressly authorized the payment of interest by the Edwards County Bank. Again, that is one of the incidental powers of the bank, except where it is expressly denied. Morse, Sec. 209. And again the question is adjudicated by the judgment of appellee against the Edwards County Bank. In any event the Edwards County Bank having received the money would be estopped from pleading *ultra vires*. Bradley v. Ballard, 55 Ill. 415; Darst v. Gale, 83 Ill. 136; Benefit Association v. Blue, 120 Ill. 128; 2 Morawetz on Corporations, 689.

“A transfer of shares in a failing concern, made by the transferrer with the intention and for the purpose of escaping liability as a shareholder to a person who, for any cause, is incapable of responding in respect to such liability, *is void, both as to the creditors of the company and as to other shareholders*, and that, too, although as between the transferrer and transferee, the transaction may have been absolute and no secret trust involved.” Cook on Stockholders, Secs. 263 and 395; Morawetz on Private Corporations, Secs. 166, 858–891; Richmond v. Irons, 121 U. S. 27; McLaren v. Franciscus, 43 Mo. 452; Central Agricultural, etc., v. Alabama, 75 Ala. 121; Marcy v. Clark, 17 Mass. 330; Angell & Ames on Corporations, Sec. 623; Gaff v. Flesher, 33 Ohio St. 107; Aultman’s Appeal, 98 Pa. St. 505; Rider v. Morrison, 52 Md. 429; Paine v. Stewart, 33 Conn. 516; Billings v. Robinson, 94 N. Y. 415; Slee v. Bloom, 19 Johns. (N. Y.) 477.

KERRICK, LUCAS & SPENCER, attorneys for appellee.

OPINION BY THE COURT.

The appellee recovered a judgment against appellant on the ground that he was a stockholder in the Edwards County Bank, of Kansas, which bank became insolvent and failed to pay a sum of money owing by it to the appellee.

The sole question of fact over which there can be any controversy, seems to be whether the appellant at the time

of the dissolution of the Edwards County Bank was a stockholder in that corporation, and this of course depends on whether he had sold and transferred the stock (which he held for a number of years) to Marzetta prior to such dissolution of the banking corporation. We are entirely satisfied with the conclusion reached by the jury upon this point.

Aside from non-compliance with the requirement of the by-laws that the transfer must be made upon the books of the corporation, as to which appellant offers the excuse that the failure to enter such transfer was not his fault, he having done all he could, though ineffectually, to that end, we think there is sufficient in the proof to warrant the conclusion that the sale of this stock here attempted was merely colorable, and for the distinct and fraudulent purpose of avoiding liability as a stockholder. Cook on Stockholders, Sec. 265 and note 1.

The important legal question is, whether by the law of Kansas, organic and statutory, a stockholder in such a corporation is liable for the debts thereof under the circumstances here disclosed, and if so, whether such liability is several and may be enforced without joining other stockholders.

We think this has been settled by the Supreme Court of that State adversely to appellant.

While we have seen no adjudication especially upon the point whether the constitutional provision is self-executing in so far as it declares liability, and whether the rule or principle there announced can have vitality and vigor only when repeated in a statute, yet the court in *Abbey v. Dry Goods Co.*, 44 Kan. 415, seem to assume, as though not a matter in doubt, that such liability exists, and while the question directly for decision was as to the mode of enforcing it, the fundamental promise was clearly taken for granted. We see no great difficulty in that view of the matter, but in any event the construction placed by that court upon the meaning of its constitution or statute, should prevail here unless very powerful considerations are opposed, and we perceive none such in this instance.

The construction placed by our courts upon statutes of this State as to the mode of enforcing liability of directors and stockholders, does not, in our opinion, require us to reject the construction placed by that court upon the ordinances of that State. If by these latter there is imposed a liability several and individual, and is enforceable against each stockholder, no reason has been suggested or occurs to us that would warrant our courts in refusing to apply the rule here.

It has been suggested that the debt was incurred without lawful power on the part of the Edwards County Bank, in whose charter there is no specific authority to borrow money; but we understand that is an incidental or implied power possessed by banking corporations generally, unless especially denied or restricted.

Of course it is not a part of the continuous practice of any bank to borrow, but it is often necessary in the reasonable exercise of express power, and hence it is usually regarded as a necessary incident. *Aloise on Banks and Banking*, Sec. 63. Certainly the borrowing must be incidental to the usual and legitimate business of a bank, otherwise the act is *ultra vires*; but it is not apparent that there was anything extraordinary or illegitimate in this loan.

Other questions suggested in the briefs need not be discussed, as in the view we are inclined to take of the case, the foregoing considerations require us to affirm the judgment.

Springfield Marine Bank v. Mitchell.

1. *Questions of Fact—Verdicts—Weight of Testimony.*—Whether the contention of a party litigant is sustained by the facts and circumstances is a question for the jury, and their conclusions should stand unless the court can see that they are manifestly against the weight of the evidence.

2. *Banking—Payment of Checks—Absence of Funds.*—The mere fact that checks drawn upon a bank upon previous occasions when the drawer had not funds on deposit were paid, will not commit the bank to the payment of the party's checks indefinitely.

Springfield Marine Bk. v. Mitchell.

3. *Banking—Liability to Pay Checks of Parties Having no Funds on Deposit.*—In a controversy over the liability of a bank to pay the check of a person having no funds on deposit, it is shown that the relations existing between, and the course of dealing pursued by the bank and the party drawing the check, were not merely such as pertain to the business of banking, but were sufficient to induce a person taking such check to accept it, believing that the bank was liable for its payment; the liability of the bank to pay the check becomes a question of fact for a jury to determine under all the facts and circumstances of the case.

4. *Evidence—Admission of Incompetent, Not Always Prejudicial.*—The admission of testimony not essential to a right of recovery, but not at all prejudicial to the opposite party, is not sufficient cause for setting aside a verdict.

Memorandum.—Appeal from a judgment for the plaintiff rendered by the Circuit Court of Sangamon County; the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 31, 1892.

The opinion of the court states the case.

APPELLANT'S BRIEF.

It will be observed that two distinct grounds of recovery are presented as follows: (1) On the check drawn by W. H. Holly on defendant bank. (2) For the price of two horses alleged to have been sold by the plaintiff to the defendant, through W. H. Holly, alleged to have been the agent for the bank, and authorized to purchase the horses for the bank. In order to recover on the check, it devolved upon the plaintiff to establish by the evidence that at the time the check was presented for payment at the defendant bank, W. H. Holly had money in the bank subject to check with which to pay the same. *Coates v. Preston*, 105 Ill. 470; *International Bank v. Jones*, 15 Brad. 594.

BROWN, WHEELER & BROWN, attorneys for appellant.

APPELLEE'S BRIEF.

We do not say the check was actually paid, but we insist that it was accepted by the bank, and whether a balancing of accounts between Holly and the bank would show in his favor or against him, can make no difference under the facts

of this case. He had funds on deposit when the check was presented, sufficient to meet it. The very money the horses sold for was put in the bank to pay the check. The bank had no right to apply it to his other indebtedness secured by mortgage or otherwise, except by his direction before the presentation of the check. *Wood et al. v. M. S. L. & T. Co.*, 41 Ill. 267; *Ridgely Nat'l Bank v. Patton et al.*, 109 Ill. 479.

PATTON & HAMILTON, attorneys for appellee.

OPINION BY THE COURT.

The appellee recovered a judgment against the appellant bank upon a check drawn upon it by one W. H. Holly, payable to A. E. Weir, and by him assigned to the appellee.

It is not contended that the drawer of the check had funds in the bank with which to pay the check, but the right of recovery, and the liability of the bank is predicated upon other grounds. The first of these is that an arrangement existed between the bank and Holly that the bank would pay his checks, which were given in payment for horses, such fact to be shown by a memorandum on the face of the check; that the appellee had notice of such arrangement, and upon the faith of it sold Holly two horses and accepted the check in payment.

The other alleged ground of liability is that Holly was acting as the agent of the bank in the purchase and sale of horses, and as such agent purchased the horses from the appellee and gave the check in payment.

Aside from an exception taken to the ruling of the court upon the admissibility of testimony, which will be hereafter noticed, the only question presented by the record is whether the evidence is sufficient to establish either of the alleged grounds of liability.

A brief statement of the evidence seems necessary. A. E. Weir, who was in the employ of Holly, testified that some months before the transaction in question, Holly

Springfield Marine Bk. v. Mitchell.

“ failed ” for a few days, and after that always wrote upon his check upon the bank, the number of horses for which it was given. That upon one occasion, the under officials of the bank declined to pay such a check until directed to do so by the president, who, when called, ordered the check paid, and said to the witness that he “ paid for stock after it was in the barn.”

The horses of the appellee were purchased on the 9th day of April, 1890, by Weir for Holly, and paid for with a check drawn by Holly upon the appellant bank, upon the face of which was written by Holly “ two horses.”

Holly was then unable to transact out-door business because of an illness which proved fatal on the 11th day of the same month. The check was drawn payable to Weir, who sent by Holly to the home of the appellee to buy the horses. Weir testifies that he told the appellee that the words “ two horses ” were upon the check in accordance with some arrangement between Holly and the bank.

Appellee deposited the check in a bank at Ashland, where he resides, and it was presented to the appellant bank for payment on the 11th day of April, 1890, and its payment refused on that day at or about the hour of the death of Mr. Holly. It further appeared from the evidence, that on the 6th day of April of the same year, Holly executed and delivered to the president of the appellant bank, for the benefit of the bank, a bill of sale of all his horses, cows, carriages, a buggy, harness, etc., etc., all contained in his barn. This bill of sale was not recorded until after the death of Holly nor was there any change made during the life of Holly in the possession or control of the property it purported to convey. The horses bought of the appellee were brought into his barn on the 9th of April, kept until the 10th and then sold, and the money received for them given by Weir to the bank and by it credited to Holly. Appellee's check was presented on the next day thereafter and payment refused.

After Holly's death the bill of sale was recorded and possession of such of the property as was in the barn taken.

The appellant bank contended and introduced evidence tending to show that there was no agreement or arrangement by which it was to pay Holly's check, whether given for horses or not, or whether so marked or not. That they had in the past occasionally paid his checks when he had no money in the bank, but only on special arrangements as to the particular check paid. That Holly was not buying horses for the bank nor was it interested in the slightest in his dealing with the appellee or others who sold to, or bought horses from him. That Holly was indebted to the bank largely for overdrafts and other matters and that the bank held to secure such indebtedness, the bills of sale before mentioned, certain policies on the life of Holly, and that one Smith was surety for a part of such indebtedness. That after applying the proceeds of the property mentioned in the bill of sale, the money received from the life insurance policies and from Smith, to Holly's credit, he was still indebted to them in a considerable amount.

This was the case presented to the jury. Whether the contention of the appellee was sustained by the facts and circumstances proven, was a question of fact for the jury, and their conclusion should stand, unless we can see that it is manifestly against the weight of the evidence.

It is evident, from the evidence, that the relations existing between, and the course of dealing pursued by, the bank and Holly were not merely such as pertain to the business of banking. It can not, therefore, be said that no liability could attach to the bank, except upon proof that Holly had funds on deposit to meet the check. The mere fact that checks drawn by him on former occasions were paid when he had no funds in the bank, would not commit the bank to the payment of his checks indefinitely. But the jury believed, from the evidence, that the bank, through its president, had agreed with Holly to pay such checks as he, in the course of his business as a dealer in horses, might draw in payment for horses, and that, in order that the bank might know that the checks were for such purchases, Holly was required to indicate that fact upon the face of

the check. The bank relied upon Holly to dispose of the horses and replace the money by depositing the proceeds of the sales in the bank. This had been the course of dealing in many instances, and the jury believed that it resulted from, and rested upon, an agreement between the bank and Holly. It was shown that the appellee parted with his horses and accepted the check in the belief that the payment of the check was thus provided for.

It was indisputably proven that the horses sold by the appellee to Holly, on the 9th of April, were sold on the 10th, and the money thus received, deposited in the bank on the same day. Appellee's check was presented on the next day. The position of the bank is that it had the right to apply the money thus received by the sale of the horses to the credit of Holly upon his general indebtedness to the bank, while, in the view of the jury, it was the duty of the bank, under the arrangement with Holly, to apply the money to the payment of the check given by Holly for the horses.

This view of the jury is correct, if the alleged agreement between the bank and Holly is proven. There is evidence tending to prove it, and we do not feel warranted in saying that it is manifestly insufficient.

The court allowed the witness Weir to state a conversation between himself and the appellee relating to the words "two horses" on the check when the horses were purchased of the appellee.

It was desired by the appellee to show that he had notice of the alleged agreement before parting with his horses and accepting the check. This evidence was admitted for that purpose.

We do not think that proof of such notice was essential to a right of recovery. If the agreement existed for payment of the check, the appellee was entitled to the benefit of it, whether advised of it or not.

We think it clear that the appellant was not at all prejudiced by this evidence, because the witness, before detailing the conversation with the appellee, had testified to all that

he knew concerning the alleged arrangement or agreement, and his statements to the appellee were neither as full nor as strong as his previous statements to the judge. The judgment ought, we think, to remain undisturbed, and it is affirmed.

Aultman & Co. v. Withrow.

1. *Rescission of Contracts*.—A rescission of a contract must be made in *toto*, and the parties to it placed in *statu quo*. So when a party used an engine from November until April following, in running a saw mill, a thrashing machine, a steam wood saw and in baling hay, and notwithstanding some defect it served the party's purpose, and according to his own testimony was of considerable value and profit to him, *it was held* that as it was not possible for him to return it to the vendor in its original condition, he could not rescind the contract.

2. *Breach of Warranty—Rescission*.—The rule seems to be well settled that in the absence of fraud, agreement to rescind in case of a breach or insolvency of the seller, or some like special reason, the buyer of property by an unconditional and complete sale can not demand a rescission of the contract simply because the warranty has failed. As a general rule, he must rely on the warranty and recover damages for its breach, or he may recoup such damages in an action against him for the purchase money.

Memorandum.—Bill in chancery to compel the surrender of notes. Appeal from a decree rendered by the Circuit Court of Sangamon County: the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed October 31, 1892.

The opinion of the court states the case.

APPELLANTS' BRIEF.

Willard, in his work on Equity Jurisprudence, says, page 303: "An action to rescind a contract for mere breach of warranty, in the absence of fraud, will not lie in equity. The party can only sue for damages." This being an executed contract and no fraud being claimed, but merely a claim made of breach of warranty or failure of consideration, the decree should not have been entered. *Thompson v.*

Aultman & Co. v. Withrow.

Jackson, 15 Am. Dec. 721, and cases there cited. A party may, on showing breach of warranty, recover damages by suit brought at any time within statute of limitations, but a rescission must be made at once without unreasonable delay, and at least as soon as discovered. Benjamin on Sales (4th Am. Ed.), Sec. 900, 901; Chitty on Contracts, 573; Johnson v. McLane, 43 Am. Dec. 105; Masson v. Bovet, Id. 651 and note; Doane v. Dunham, 65 Ill. 516.

CONKLING & GROUT, solicitors for appellants.

APPELLEE'S BRIEF.

The appellants were the manufacturers of the engine, and there is an implied warranty that it was reasonably fit for the purposes for which it was manufactured, which supplements the express warranty. Benj. on Sales, 872, 873, note 40; Thorne v. McVeagh, 75 Ill. 81; Beers v. Williams, 16 Ill. 69.

Appellee had a right to rescind the contract. While some of the States of the Union have held that a contract can not be rescinded for such breach, our courts have uniformly held that the vendee has the right to return the property and demand a return of his notes. Howe Machine Co. v. Rosine, 87 Ill. 105; Sparling v. Marks, 86 Ill. 125; Beers v. Williams, 16 Ill. 69; Prickett v. McFadden, 8 Brad. 197; Hall v. Freeman, 59 Ill. 55; McCormick v. Snell, 23 Ill. App. 79; Underwood et al. v. Wolf, 131 Ill. 425.

ORENDORFF & PATTON, and PATTON & HAMILTON, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This was a bill in chancery filed by the appellee to compel the appellant company to surrender three certain notes executed and delivered to it by the appellee.

The decree of the court rendered upon a report of proofs taken before the master was that the prayer of the bill be granted; from which this appeal. The evidence shows

that the appellee on the first day of November, 1888, purchased of the appellant company, an engine thresher and patent stacker, for the gross sum of \$1,750. He paid in cash \$25, and for the balance gave three notes, one for \$600, due in one year, one for \$575, due in two years, and one for \$550, due in three years. He was dissatisfied with the engine for some reason, not very definitely shown by the testimony, and after some controversy with the agents of the appellant company, about November 1, 1889, exchanged it for another engine belonging to the appellant, and gave in addition his note to the company for \$225, and at same time paid his note of \$600, then due. He then had this last engine, the stacker and thresher, and the appellant company held his three notes, two given when first engine, stacker and thresher were purchased, and the other given as difference in exchanges of engines.

He kept the engine from November until April, and during that time used it, with some interruptions because of the leaking of its flues. He complained to the appellant, and its agents on three occasions assisted in repairing it. In April the appellee tendered the engine back to appellant and demanded the return of all his notes, and this the decree of the court awarded to him.

The appellee contended that the engine was accompanied with an express verbal warranty that it was of good material and workmanship, and fit and proper for the use and purpose for which it was made, and so expressly warranted to continue for the space of one year; that the engine leaked at the flues and failed to do good work, and for that reason he refused to keep it.

The appellant company denied that the engine was warranted at all. The engine first sold was warranted in writing, but so conditioned that if the terms of that written warranty could be deemed to apply to the latter engine, it would avail the appellee nothing in this proceeding. He sought to prove that a verbal warranty was made when the engines were exchanged. We have examined the evidence bearing upon this alleged verbal warranty, and think the

preponderance is not with the appellee. In point of number the witnesses are against him, and we perceive no sufficient reason for giving greater credence to those who testified in his behalf. The case was submitted to the trial judge upon depositions taken before the master; hence, such judge had no means superior to ours for judging of the credibility of the witnesses, or the proper weight to be given to their testimony. The appellee was entitled to the benefits of the warranty implied by the law, that the engine was made of sound material and good workmanship. But we do not understand that a breach of the warranty contended for, or of the warranty implied by the law, would authorize the appellee to rescind the contract, and by tendering back the engine become entitled to demand, and have returned, all his notes held by the appellant.

One sufficient reason why he could not so proceed is that two of the notes were given in part payment of a gross sum due for the first engine, the separator and the stacker. We find no proof and do not understand that it is claimed that the appellant company accepted the \$600, paid in discharge of the note of appellee first falling due as payment for the stacker and separator, or that there was any agreement that the unpaid notes should be considered as representing the purchase price of the engine alone.

We think the notes for \$575 and \$550, respectively, represented the unpaid balance of the gross amount contracted to be paid for the separator and thrasher, and the engine first sold, and we can imagine no reason why these notes should be surrendered to the appellee, and he be allowed to retain the machinery for which the notes were in part given. Rescissions of contracts must be made in *toto* and the parties placed in *statu quo*. Then appellee used the engine from November until April in running a saw mill, a threshing machine, a steam wood saw, and in baling hay. While it may, during that time, have leaked at the flues, and in other respects not worked as it ought, yet it served appellee's purpose, and according to his own testimony, was of considerable value and profit to him. He had so used it that it was not possible to return it to the appellant in its original condition. This

deprived him, we think, of the right of rescission. The decree seems to proceed upon the theory that a breach of a contract of warranty authorizes a buyer to rescind the contract, without regard to character of the breach, or the amount of damages occasioned thereby.

This may well be doubted. Indeed, the rule seems to be well settled that, in the absence of fraud, agreement to rescind in case of a breach, or insolvency of the seller, or some like special reason, the buyer of property by an unconditional and complete sale, can not demand a rescission simply because the warranty has failed.

As a general rule, he must rely on the warranty and recover damages for its breach, or he may recoup such damages in an action against him for the purchase money. Addison on Contracts, Sec. 632; 2 Sutherland on Damages, page 417; *Crabtree v. Kile*, 21 Ill. 180; *Owens v. Sturges*, 67 Ill. 366.

We observe nothing in the circumstances of the case at bar to take it out of the operation of the general rule. Moreover, the decree appears to us inequitable. Its effect is to allow the appellee to retain the separator and stacker and yet have returned to him two notes, partly given for the machinery so retained. It allows him to return the engine after using it for about five months, without regard to the effect of such use upon it or to its condition, and receive in return three of his notes, two of which were partly given for other machinery which he retains, and all of this without taking into account or consideration the benefits and profits derived by the appellee from the use made of the engine. For these reasons the decree must be reversed and the cause remanded.

St. Louis & Peoria R. R. Co. v. Kerr et al.

1. *Assignment of Errors.—Who May Assign.*—Under section 70 of the Practice Act, where a judgment is rendered against two or more persons, either of said persons may remove the suit by appeal or writ of error to the Appellate Court, and for that purpose are permitted to use the names of all, if necessary; but no cost can be taxed against any person who does not join in the appeal or writ of error, the manifest

St. L. & P. R. R. Co. v. Kerr.

object of this provision being to give each defendant the right to present any point affecting him, which he may desire the court to determine, whether his co-defendants are content with the judgment or not. Parties to the judgment who do not join in the appeal or writ of error will not be allowed to enter their appearance in the Appellate Court for the purpose of assigning errors.

2. *Assignment of Errors by Parties Not Joining in an Appeal.*—Where a party to a judgment did not join in an appeal, but afterward entered his appearance in the Appellate Court, and obtained leave to assign errors, the errors so assigned will be stricken from the record on motion of the appellees.

3. *Rights of Parties Not Joining in the Appeal.*—As a party not having appealed, can assign no error, so parties who have appealed, can assign no error which affects only the rights of the parties not appealing.

4. *Contractors' Liens—Sub-contractors.*—Contractors for work in the construction of a railroad have a lien expressly given them by the statute (Par. 55, Chap. 82, R. S.) superior to all mortgages or other liens accruing after the commencement of the work. Provision is made for the protection of sub-contractors to the extent of the price agreed upon between the corporation and the sub-contractor, and he acquires a lien against the railroad company by giving the notice prescribed by the statute, and complying with its provisions.

5. *Parties—Mortgage Given to Secure Bonds.*—The rule is well settled that where a mortgage is given to secure bonds, which are negotiable by delivering, the trustee named in the mortgage is to be deemed the representative of the bondholders, and may litigate in their behalf. They are not necessary parties whether the trustee is complainant or defendant, or whether the mortgage is a prior or subsequent incumbrance; it is sufficient if the trustee is a party. The general rule that all persons who have an interest in the controversy must be made parties, has an exception in such a case.

6. *Interest—Sub-contractor's Lien.*—A proceeding to enforce a lien by a person as a sub-contractor against a railroad company is a proceeding to enforce a liability for money due on an instrument in writing, and is within the terms of the statute allowing interest.

Memorandum.—Suit in equity to enforce a sub-contractor's lien. Appeal from a decree rendered by the Circuit Court of Madison County; the Hon. ALONZO S. WILDERMAN, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 31, 1892.

APPELLEES' STATEMENT OF THE CASE.

The complainants filed their bill in the Circuit Court of Madison County, against A. M. Wing and D. L. Wing, com-

posing the firm of A. M. Wing & Co., the St. Louis & Peoria Railroad Company and the Central Trust Company, of New York, the object of which was to enforce a lien against the property of the railroad company. A. M. Wing & Co. were the original contractors with the St. Louis & Peoria Railroad Company for the construction of a railroad from Mount Olive, in Macoupin County, to Alhambra, in Madison County, and the Central Trust Company was the mortgagee of the said railroad. The complainants were sub-contractors under A. M. Wing & Co. The Circuit Court, by its decree, established a lien in favor of the complainants, superior to the lien of the mortgage, for the amount found due, \$4,604.82, and interest thereon from the time the suit was brought. \$479.33, and in the aggregate \$5,184.15. From this decree the St. Louis & Peoria Railroad Company only, has appealed.

CONKLING & GROUT, solicitors for appellant.

APPELLEES' BRIEF.

Where the railroad is incomplete when the mortgage is executed, and in process of construction, the contractor's lien takes precedence over the mortgage. Wood on Railways, Vol. 2, Sec. 292; Brooks v. Railway Co., 101 U. S. 443; Meyer v. Hornby, Ibid. 728; Construction Co. v. Meyer, 100 U. S. 457; Neilson v. Railroad Co., 44 Iowa, 71.

The Central Trust Company was not a necessary party to this bill, but a proper party. The rule is, without exception, that if a proper party is omitted, the objection must be taken by demurrer, plea or answer. 1 Daniell's Ch. Pl. and Pr., page 285, note 2.

The following authorities, among many, clearly establish the proposition that it was not necessary to make the holders of these bonds parties to the bill. Jones on Railroad Securities, Sec. 438 *et seq.*; Shaw v. Norfolk R. R. Co., 5 Gray (Mass.), 162; Board of Supervisors v. Min. Point R. R. Co., 24 Wis. 93; Corcoran v. Chesapeake & O. R. R. Co., 94 U. S. 741; Kerrison v. Stewart, 93 U. S. 155; Van Vechten v. Terry, 2 Johns. Ch. (N. Y.) 197.

BROWN, WHEELER & BROWN, attorneys for appellees.

OPINION BY THE COURT.

The appellees filed their bill in chancery in the Circuit Court to enforce a lien claimed by them as sub-contractors against the railroad of the appellant.

The bill made parties defendant, the appellant, A. M. Wing & Co., the contractors, and the Central Trust Company, trustee of certain mortgage bonds issued by appellant.

The Circuit Court rendered a decree finding that the complainants in the bill were entitled to their lien as against all the defendants for the sum of \$5,184.15, and ordered payment of the same within sixty days, in default of which the road was to be sold. An appeal was allowed to all the defendants or any of them upon filing bond, etc.

The appellant, the railroad company, alone perfected an appeal by filing bond in pursuance of the order of the Circuit Court, and caused a copy of the record to be filed in this court, and assigned error upon said record. Subsequently, during the May term, the Central Trust Company, D. L. Wing and A. M. Wing entered their appearance in this court and obtained leave to assign errors. Afterward the appellees moved to strike from the record the assignments of error by the trust company and by D. L. & A. M. Wing. This motion was taken by the court and reserved to the hearing of the case. It must now be disposed of. By section 70 of the Practice Act it is provided that where a judgment or decree is rendered against two or more persons either of said persons shall be permitted to remove the suit by appeal or writ of error to the Appellate Court, and for that purpose shall be permitted to use the names of all if necessary; but no cost shall be taxed against any person who shall not join in said appeal or writ of error; and that such suits shall be determined in the same manner as if all the parties had joined in said appeal or writ of error.

In *Hodson v. McConnel*, 12 Ill. 170, one of several defendants to whom an appeal was allowed had not joined in the appeal, but assigned error, and the appellee joined in

errors. Afterward the appellee objected to the consideration of errors so assigned by him, who had not appealed, but the Supreme Court held the objection came to late.

We have not been referred to any ruling more directly in point. The statute permits the appeal to be prosecuted by one of several parties, and for that purpose the names of all may be used as far as necessary; but no cost shall be taxed against one who does not join in the appeal, and the case shall be determined in the same manner as if all had appealed. The manifest object was to give each defendant the right to present any point affecting him and which he might desire the court to determine, whether his co-defendants were content with the judgment or not. It was not designed that he should complain of matters not affecting him, but in order that all matters of which he might properly complain should be fully considered, it was provided that the case should be determined as though all parties had joined in the appeal, and the whole record was in all respects to be examined. But, as we take it, such examination is only for the purpose of considering errors properly assignable by him who appeals.

It is a matter of frequent ruling that one can not assign error upon a point not affecting him, and can not ask a reversal for errors which are not hurtful or prejudicial to his interests.

The statute expressly relieves from all cost a co-defendant not joining in the appeal, and, as a matter of course, such a party having given no security for the payment of the judgment, incurs no risk whatever by reason of the appeal. We are inclined to the opinion that he can not assign error and we shall consider in the present case, only the errors assigned by the appellant company. The errors assigned by D. L. Wing and A. M. Wing and by the Central Trust Company will be stricken out.

The first assignment of error argued in the brief is that the court allowed complainants for a portion of the work at the price fixed in the contract for "hard pan," when it should have been regarded as only ordinary earth work and paid for accordingly.

This position is based upon the provision of the contract by which, as it is argued, the estimate of the engineer was to be conclusive, and also upon the proposition that the evidence fails to show there was any hard pan. It is not denied by counsel for appellees that by the contract the estimate of the engineer was controlling, but it is said the contractors did not themselves comply with the contract in this respect; that the estimates which were furnished while the work was progressing were not complete and were not so regarded by either side or by the engineer, and that the final estimates were not only not made and furnished when the contract required, but were held back at the instance of D. L. Wing, who was the president of the railroad company and the active man in the firm of A. M. Wing & Company, the chief contractors, and further that the estimates are impeachable for fraud or mistake.

It is shown that the estimates which were furnished while the work was in progress were not complete and were not so regarded. At least there is evidence tending to establish this view of it. There is also abundant proof that the requirement of the contract, in this respect, was disregarded by the chief contractors. The engineer, while nominally and perhaps in fact the employe of the railroad company, was apparently under the control of D. L. Wing, who was acting in the double capacity of president of the railroad company and chief contractor.

At Wing's instance the final estimates were withheld from the appellees, the sub-contractors, though they made repeated requests therefor, and were not produced until shortly before the cause was tried, two years or more after they were due. According to evidence of the appellees the engineer had promised to make proper estimates for hard pan, which he had omitted in the two incomplete estimates furnished while the work was in progress. It was unknown to the appellees whether, in the final estimates, this item was or would be allowed or not, and they were permitted to see these estimates until a short time before the hearing. Here was a clear breach of the contract. The engineer, who was pre-

sumably the employe of the railroad company, as he professed, and who should have been impartial and perfectly fair in making the estimates, was subject to the control of D. L. Wing.

There was evidence tending to show, not only breach of contract, but want of good faith on the part of Wing & Co., who were able thus to control the action of the engineer in a matter where they were deeply interested. Add to this the satisfactory proof that there was a large amount of work which by the terms of the contract should have been classified as "hard pan," and we think there was enough to warrant a court of equity in disregarding the estimates so far as they omit such classification.

It was quite evident the estimates could not be relied upon as the unbiased judgment and conclusion of the engineer, and that they were subject to the suspicion of having been the inspiration, if not the direct creation of the contractors. We are of opinion there was no error committed by the court in making allowance for "hard pan."

The estimates were properly disregarded in that respect.

It is next urged that the appellees did not take such steps as to secure to them a lien superior to that of the mortgage held by the Central Trust Company.

If we are correct in holding that said Central Trust Company, not having appealed, can not assign error, it would seem that this question can not now arise.

It is not apparent how the railroad company can be affected by the question, nor how it can affect Wing & Co., unless there are conditions to which our attention has not been directed. By the contract between the railroad company and Wing & Co., payments were to be withheld in such a way as to protect the railroad company from loss, by reason of unpaid claims of contractors, it being therein provided that the bonds and stock of the railroad company, which Wing & Co. were to receive for building the road, were to be placed in the hands of parties in New York, to be paid out by them upon certificates of the executive committee of the railroad company, at the rate of ninety per cent

of the work done, and on acceptance of the road, the balance; and further, it required Wing & Co. to furnish evidence to the directors of the railroad company of the completion of the road, according to contract, and that the property was free from liens or incumbrances, etc. The sub-contract was made and work begun under it before the mortgage was executed.

The property mortgaged was in process of construction when the mortgage lien was created, though if the railroad company and the contractors complied with their contract the bonds were not delivered then, nor were they all deliverable until the road was completed and free from liens arising in course of its construction.

The contractors had a lien expressly given them by the statute superior to all mortgages or other liens accruing after commencement of the work. Par. 55, Ch. 72, R. S.

By the following section provision is made to protect sub-contractors to the extent of the price agreed to be paid by the corporation to the chief contractor. The sub-contractor acquires a lien upon the property of the corporation by giving the notice prescribed in the section next following. The notice was given in this instance by the sub-contractors, and this suit was commenced within the time provided by the statute. It is clear that as against the railroad company a statutory lien was acquired by the steps thus taken.

It is urged that by the second proviso of Par. 56, the sub-contractor could not obtain priority over an existing lien and that by the proviso of Par. 57, the lien did not attach until the notice was given.

So far as the railroad company is concerned the question is not important whether the lien attached from the time the notice is given, or whether it relates back to the time work was commenced under the sub-contract.

In either case there is a lien upon the road, and whether that lien takes precedence of a mortgage executed after the work began and before the notice was given, is a matter affecting only those who claim by virtue of that mortgage. The railroad company could not rightfully pay Wing & Co.

until the expiration of twenty days from the time the subcontract was furnished, and by the terms of the contract between the railroad company and Wing & Co., as already observed, care was taken to protect the former against loss in this respect. *Havighorst v. Lindberg*, 67 Ill. 463.

We are of opinion the railroad company can make no complaint in this respect.

Another objection urged is that the holders of the bonds which the mortgagee was given to secure were not made parties. We are not able to see how this objection, if well founded, can be made by the railroad company.

The objection should have been raised in the Circuit Court, which was not done by the appellant or by the trust company, and should not be made for the first time in this court.

But the rule seems to be well settled that where a mortgage is given to secure bonds which are negotiable by delivery, the trustee named in the mortgage is to be deemed the representative of the bondholders and may litigate in their behalf. They are not necessary parties, whether the trustee is complainant or defendant, or whether the mortgage is a prior or a subsequent incumbrance. It is sufficient if the trustee is a party.

The general rule that all persons who have an interest in the controversy must be made parties, has an exception in such a case. *Shaw v. Norfolk, etc., R. R. Co.*, 5 Gray, 162; *Jones on R. R. Securities*, Sec. 338; *Land Co. v. Peck*, 112 Ill. 408.

The objection will be overruled.

It is objected lastly that the court erred in allowing interest upon the amount found due.

This was a proceeding to enforce a liability for money due on an instrument in writing, and the claim is within the terms of our statute, as we regard it.

The mere fact no definite sum is fixed by the writing and that the amount due rests in computation makes no difference. We think interest was properly allowed.

The decree will be affirmed.

Wright, Impleaded, etc., v. Jacksonville Benefit Building Association.

1. *Foreclosure—Premises Subject to Different Liens.*—Where the owner of property mortgages to secure his own and his wife's obligation, and afterward mortgages to the same person to secure the obligation of another person, such person joining in the mortgage, and subsequently sells the land, the purchaser takes it subject to both liens and is bound to discharge the one as well as the other, if he wishes to obtain a perfect title. It is not error in a decree of foreclosure to hold the premises subject to both liens generally, and provide for the sale of the premises in case the defendant fails to discharge them.

2. *Solicitor's Fees.*—Where solicitor's fees are provided for in a mortgage, in the event of foreclosure, it is not error to include the amount specified as costs, in the decree.

Memorandum.—Foreclosure in chancery. Writ of error to the Circuit Court of Morgan County to reverse a decree of foreclosure rendered by that court; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed October 31, 1892.

The opinion of the court states the case.

OSCAR A. DELEUW, solicitor for plaintiff in error.

EDWARD P. KIRBY, solicitor for defendant in error.

OPINION BY THE COURT.

Marlow Riley and Margery Riley, his wife, executed a mortgage upon certain real estate held in fee by Marlow Riley to secure two bonds payable to the appellee, one of said bonds being signed by the said Marlow and the other by said Margery.

Subsequently the said Marlow Riley and his wife, together with Wm. M. Riley, executed another mortgage on said land to the appellee to secure a bond payable to the appellee and signed by said Wm. M. Riley. Still later, said Marlow Riley and wife conveyed the mortgaged premises to Wm. M. Wright, the appellant. The appellee, after said conveyance, filed its bill to foreclose said mortgages, making the

Rileys and said Wright parties defendant. The Rileys made no answer and were defaulted. Wright demurred to the bill. The demurrer was overruled and a decree passed accordingly, the said Wright having elected to stand by his demurrer. The writ of error sued out by said Wright brings the record here for our consideration.

It is urged that the decree is erroneous because it holds the premises subject to the lien of the bond given by Wm. M. Riley, and it is insisted that as Wright purchased the interest of Marlow Riley, the decree should have provided that he, Wright, might "redeem as to the part covered by the mortgage of said Marlow and wife, by paying the amount due on that mortgage debt." We can not see wherein the decree is erroneous in this respect.

The owner of the property chose to mortgage it to secure his own and his wife's obligation, and afterward he mortgaged it for the purpose of securing the obligation of Wm. M. Riley, the latter joining in the mortgage. When Wright subsequently bought the land, he took it subject to these two liens, and was bound to discharge the one as well as the other, if he wished to obtain a perfect, unincumbered title. No possible objection can be made to the requirement of the decree that the sum total of both obligations should be paid and that in default of such payment, the mortgaged premises should be sold to satisfy the amount so found due.

Nor is it perceived that any just complaint can be made that the decree included as costs, the sum of \$50 for solicitor's fees. Each mortgage provided for the payment of such a sum for such fee in the event of foreclosure.

It seems to be objected that the decree is faulty in not providing who shall pay this fee.

It is provided that the debtors, the Rileys, pay the amount found due, with interest, and the costs, including said fees, and that unless they, or the other defendant, make such payment, then the premises shall be sold, etc. There is no error in this respect, and no other objections being urged, the decree will be affirmed.

Tearney et al. v. Fleming et al.

1. *Costs in Equity Awarded in Accordance with Right.*—Patrick J. Fleming filed a bill of interpleader against James Tearney, Patrick Tearney and Patrick Kealey, setting up that James Tearney, a minor, was in his employ during the season of 1890; that he owed for the work \$95.90; that his father, Patrick Tearney, being still living, he supposed the wages were due to and the property of Patrick Tearney in right of a parent; that James claimed them as being emancipated; that Patrick Kealey, holding a judgment against Patrick Tearney, garnisheed Fleming, and judgment was rendered against him for \$39.90 and costs of suit; that Fleming, to protect himself, prayed an appeal to the County Court where the case was still pending; and that James Tearney commenced suit against him in the same court for said wages, which suit was also still pending; and praying that James Tearney, Patrick Tearney and Patrick Kealey interplead, and for an injunction against Kealey and James Tearney and Patrick Tearney from prosecuting their suits, etc. *It was held* error to award that the costs of the proceeding and of the suits in the County Court of Patrick Tearney, for the use of Patrick Kealey, by his next friend, Patrick Tearney, against Patrick Fleming, and of James Tearney against Patrick Fleming, be paid by the clerk of the Circuit Court out of the fund to be paid into his hands by the complainant, and that the residue be paid to James Tearney.

2. *Laches—Infants.*—Infants are not chargeable with *laches*; the presumption is that they do not know their rights.

Memorandum.—Bill of interpleader. Writ of error to the Circuit Court of McLean County, to reverse a judgment rendered by that court; the Hon. CHARLES R. STARR, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed in part, reversed in part and remanded with directions. Opinion filed December 2, 1892.

PLAINTIFFS' BRIEF.

James Tearney being a minor, *laches* is not imputable to him for not interfering in the garnishee suit before the justice. *Smith v. Sackett*, 5 Gil. 547; *C., R. I. & P. Co. v. Kennedy*, 70 Ill. 350; *Johnston v. Johnston*, 138 Ill. 385, June, 1891; *Huling v. Huling*, 32 Ill. App. 519.

FRANK R. HENDERSON and EZRA M. PRINCE, attorneys for plaintiffs.

DEFENDANTS' BRIEF.

Upon a decree of interpleader the costs are paid, in the first instance, out of the fund in court. 2 Daniell's Ch. Pl. & Pr. (5th Ed.) 1569 and cases cited; Canfield v. Morgan, Hopk. Ch. (N. Y.) 224; Thompson v. Ebbetts, Hopk. Ch. (N. Y.) 272; Bispham's Principles of Equity (4th Ed.), p. 478, Sec. 422.

BENJAMIN & MORRISSEY, counsel for Patrick Fleming, defendant in error.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

This was a bill of interpleader filed April 14, 1891, by Patrick Fleming against James Tearney, Patrick Tearney and Patrick Kealey, averring that James Tearney, a minor, about sixteen years of age, was in complainant's employ as a farm hand during the season of 1890; that he owed for said work a balance of \$95.90; that Patrick Tearney, the father of James, being still living, he supposed these wages were due to him in right of a parent, but James claims them, as having been emancipated; that Kealey, having a judgment against the father, garnisheed complainant, and obtained judgment for \$39.90 and costs; that complainant, to protect himself, took an appeal to the County Court, where the case is now pending; that James Tearney then commenced suit against him for said wages in that court and that case is also now pending. Complainant then avers his readiness to pay said \$95.90 to whichever of the parties claiming may be entitled to it, offers to bring the money into court for that purpose and subject to its order, and prays that they be required to interplead, and be enjoined against prosecuting said suits.

Defendants answered, Patrick Tearney disclaiming all right to the money and denying that he had ever asserted any, and that complainant had any ground to suppose or did suppose he claimed it; James asserting his, and Kealey denying the alleged emancipation and charging that these wages were due to Patrick Tearney as the father of

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James. Replications were filed and proofs taken, and on final hearing the court decreed to complainant the relief asked, and as between the defendants found "that the said fund is the wages of the defendant James Tearney, earned by him from the complainant for his work as a farm hand and not claimed by the defendant Patrick Tearney, and that as between the defendants, James Tearney and Patrick Kealey, the said fund is not subject to garnishment at the suit of the defendant Patrick Kealey, claiming, as he does, as a judgment creditor of the defendant Patrick Tearney," and concludes as follows: "It is therefore ordered, adjudged and decreed by the court that the costs of this suit to be taxed by the clerk of this court, and the costs of the said suits in the County Court of McLean County, Illinois, of Patrick Tearney, for the use of Patrick Kealey against Patrick Fleming, and the suit of James Tearney by his next friend, Patrick Tearney, against Patrick Fleming, shall be paid by the clerk of this court out of the said fund paid into his hands by the complainant, Patrick Fleming, in this cause; and that the residue of said fund be paid by the said clerk to the said defendant James Tearney. It is further ordered that the said suits in the County Court of McLean County be dismissed by the plaintiffs therein." The defendant James Tearney prosecutes this writ of error and complains of the decree as to the costs. It appears that in the three cases they amount to \$73.70, all of which is charged, absolutely and finally, upon the fund the decree finds was rightfully his.

Why those of Kealey in the garnishee proceeding or in this case should be so charged we do not see; and if those of Fleming were properly so in the first instance, they too, should eventually be recovered from the defeated claimant, and the decree should have so provided. We think, however, the evidence shows that complainant himself had no equitable right to costs as against James Tearney. No ground of objection to his bill appears on its face. The proper way to treat it, therefore, was to answer it. But had it also stated the facts, fully proved, that before answer-

ing as garnishee he had full notice of James' claim and nevertheless answered that he was indebted to Patrick and gave no intimation of that claim, it would have shown a want of equity in willfully disregarding the right of the defendant and neglecting to avail of an adequate legal remedy then at hand. He deliberately put himself in the position from which he sought by his bill to be relieved; and the decree relieves him at the expense of the party without fault, whom he wronged in so doing. His own fault and neglect occasioned all the litigation that followed his answer. From the finding of the decree it appears that by the notice he had received from both Patrick and James, he would have been justified in answering that he was not indebted to Patrick. They were both then present and prepared to testify as to the emancipation. Complainant's duty to this boy required him at least to state that he claimed the wages due for his labor. Such a statement, it may be presumed, would have led to his discharge at Kealey's cost, and there would have been no occasion for James' suit, his own appeal, or this bill. Besides the notice referred to, given him a few days previously, James told him at the justice's office just before his answer, that he would sue him if not paid, and we think his answer, under the circumstances, was a needless provocation to the suit that so promptly followed. No excuse or reason for his conduct has been suggested. Self-protection and fairness to this infant claimant alike called upon him to make known the claim. The grounds of his right to the relief here sought, are, that being in no way to blame for his position, and having acted impartially toward the contesting claimants, he should not be required to determine at his peril which is right. But with what grace or equity can complainant urge these grounds, when he has voluntarily, needlessly and against warning, assumed the responsibility and risk of such determination? A word from him before the justice of the peace would have accomplished all that is sought by this bill, but he would not speak it. Yet this decree relieves him from a judgment he had confessed for the use of Kealey, and another suit that he had

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defiantly invited upon a just claim, at his instance, and at the cost of the creditor whose claim, now found to be just, he wrongfully ignored.

It is said that plaintiff in error had notice of the garnishee proceeding, was present at the time of the hearing, and could then have made known his claim and on his own application been admitted as a party to prove and establish it. R. S., Ch. 62, Secs. 11, 12. He should lose no right by reason of his failure to intervene in that way. Infants are not chargeable with *laches*. The presumption is that the boy did not, in fact, know he might so intervene, else he would not have resorted to another proceeding more expensive and dilatory.

We think the decree was wrong in its disposition of the costs; that those of the garnishee proceeding should have been adjudged against Kealey, those in the case in the County Court of James Tearney v. Fleming against Fleming; those of this case in the court below also against Fleming, and in this court against Kealey and Fleming equally.

Decree affirmed in part, and reversed in part, and remanded with directions.

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48	511
94	251

1. *Practice—Failure to Enter a Default.*—On the trial of an action of assumpsit, the court, in the absence of a plea to the declaration, and in the absence of the defendant, without entering a default, impaneled a jury and proceeded to assess the plaintiff's damages, and upon the verdict rendered a judgment. *Held*, that the failure to take and enter the default was a fatal error.

Memorandum.—Action of assumpsit. Writ of error to the Circuit Court of Greene County to reverse a judgment rendered in that court: the Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed December 2, 1892.

PLAINTIFF'S (BELOW) STATEMENT OF THE CASE.

This was a suit by John W. Shake, on a promissory note,

made to him by Charles Lahr and Romantis Fritchman, dated August 25, 1886. Lahr was served with process, and the suit proceeded against him to judgment.

At the return term of the summons, September, 1886, defendant Lahr appeared and filed what is called a plea in abatement, setting up the death of plaintiff before the bringing of the suit. Without any rule being entered requiring plaintiff to reply to or answer the so-called plea in abatement, the cause was continued. At the next term, February, 1887, the plaintiff's death was suggested, and leave granted to make the administrator, H. M. Vandever, the party plaintiff; and the record fails to disclose that there was any objection or exception made or taken to the action of the court in allowing the change to be made by the substitution of the administrator. At this term, on March 4, 1887, the cause was tried before a jury, and verdict rendered; but before such trial, on the same day, defendant below appeared by attorney and moved for a continuance of the cause. This motion was denied, and the attorney excepted.

PLAINTIFF'S BRIEF.

A proceeding at law can not be maintained in the name of a dead person, nor can one be begun in the name of a dead person. Nor does the rule apply that would, had the original plaintiff died after summons had been served. *Life Association of America v. Fassett*, 102 Ill. 315; *Brown v. Parker*, 15 Ill. 310; *Douglas v. Newman*, 5 Brad. 518.

The court should have entered a rule on defendant to plead to the declaration, and given him notice, or at least reasonable time, and not proceed the same day to try the cause in the absence of the defendant and his attorney, he being in no default; having a plea on file unanswered, that was a complete defense. *Blake v. Miller*, 118 Ill. 501.

W. M. WARD, attorney for plaintiff in error.

DEFENDANT'S BRIEF.

The motion made by defendant below for a continuance,

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was an appearance to the action, and a waiver or abandonment of his plea. *Mitchell v. Jacobs*, 17 Ill. 235; *Easton v. Altum*, 1 Scam. 250; *Flake v. Carson*, 33 Ill. 518.

A plea in abatement, being calculated to defeat justice, must be drawn with strict accuracy, even as to form, or it can not be supported. *Feasler v. Schriever*, 68 Ill. 322.

In *Holloway v. Freeman*, 22 Ill. 201, the court said: "As to pleas in abatement, it is to be observed that great strictness is required in framing them, as they are dilatory, not going to the merits of the action." Such pleas are not approved by the court, as they tend to thwart justice rather than to promote it. *Humphrey v. Phillips*, 57 Ill. 132.

They must give a better writ, by disclosing the name of the proper party. *Railroad Company v. Munger*, 78 Ill. 300; *Insurance Company v. Palmer*, 81 Ill. 88. And the plea must pray a particular and proper judgment. *Hall v. Marks*, 56 Ill. 125; *Pitts Mfg. Co. v. Bank*, 121 Ill. 582.

The court might have, *sua sponte*, stricken it from the files. *Leake v. Brown*, 43 Ill. 372.

H. M. VANDEVEER, *pro se*.

GROSS & BROADWELL, of counsel for defendant in error.

OPINION BY THE COURT.

In the court below, in an action of assumpsit, in the absence of a plea to the declaration, the court, when the plaintiff in error, who was defendant, was not present, without entering a default, impaneled a jury, assessed the damages of the defendant in error, as administrator, who was the plaintiff in the action, and upon the verdict of the jury thus procured, rendered the judgment sought to be reversed. Upon the authority of *Crabtree v. Green*, 36 Ill. 278, it seems that the failure to take and enter the default, was a fatal error. This holding is not without the support of other authorities. 5th Amer. & Eng. Ency. of Law, 487. For the omission indicated, the judgment is reversed and the cause remanded.

Webb, Sheriff, etc. v. Hollenbeck.

1. *Homesteads—Exemption from Sale on Execution.*—A party and his wife not residing in a home of their own, purchased a vacant lot on which to erect a dwelling for their family, the deed for the same being delivered to him eleven days afterward. Before the delivery of the deed he had the lot inclosed, a garden broken, the foundation for the house laid, and the lumber for its completion on the ground. About a month afterward his family moved into it, though it was not yet quite completed. About a week before the family moved into the house, a person having a justice's judgment against him, filed the same in the office of the clerk of the Circuit Court, caused an execution thereon to be issued and delivered to the sheriff, under which he levied and was proceeding to sell when he was enjoined. It was contended that because he was not, at the time the execution was placed in the sheriff's hands, residing with his family upon the lot, he had no homestead therein, but *it was held* otherwise, and the injunction made perpetual.

2. *Parties—Want of Proper Parties in Chancery Proceedings.*—A defendant in a chancery proceeding, after answer and trial, without objection, can not complain of the omission of a party which does not prejudice him.

Memorandum.—Bill to enjoin the sale of a homestead on execution. Appeal from a decree restraining sale, rendered by the Circuit Court: the Hon. EDWARD P. BAIL, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed December 2, 1892.

The opinion of the court states the case.

F. M. HARBAUGH, solicitor for appellant.

W. G. COCHRAN, JOHN R. & WALTER EDEN, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

Appellee filed the bill herein to enjoin the sale by appellant on execution against him of premises claimed to be exempt as his homestead. A preliminary injunction allowed by the master was, on final hearing, made perpetual.

The parties were the only witnesses and there is no dis-

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pute about the facts. Appellee, residing with his wife and two children in the city of Sullivan, whether as renters or boarders does not appear, but not in a home of their own, about the first of April, 1891, purchased a half-block there, then and always before vacant, on which to erect a dwelling for his family. The deed, which was made to him and his wife, was not delivered until the 11th of that month. Before that time, however, he had the lot inclosed, a garden broken, the foundation for the house laid and the lumber for its completion on the ground, and about the middle of May moved his family into it, though it was not yet quite completed.

About a week before that, on May 8th, a judgment of a justice of the peace against him, rendered in October last preceding, in favor of the Wilson Grocery Company, was filed in the office of the clerk of the Circuit Court, and on the same day an execution was issued thereon and delivered to appellant, under which he levied upon and advertised the sale of the undivided half of said lot, as appellee's interest therein. The money appellee put into it did not exceed the sum of \$4,500. All the property he then possessed did not, in value, exceed that sum. The premises as improved were worth about \$850.

Appellant contends that, because at the time the execution was placed in his hands appellee was not residing with his family upon the land levied on, he had no homestead estate therein. His broad proposition is, that to be exempt from the lien of the judgment, they must at the time it takes effect, be in actual occupation, by residence thereon of the debtor and his family, as and for a homestead; in support of which he cites *Reinback v. Walter*, 27 Ill. 393; *Tourville v. Pierson*, 39 Id. 446; *Chappell v. Spire*, 106 Id. 472; and *Rock et al. v. Haas*, 110 Id. 528. These cases hold that the homestead right must exist at the time the judgment or other lien takes effect, and that its existence is not proved by the mere fact of an intention to occupy as a residence or even of an actual purchase with such intention; and they use the general description in the statute—"occupied as a

residence;" but we think neither of them attempts an exclusive definition of such actual occupation or reaches the more particular question arising on the facts here presented. Appellee, having no homestead, not only purchased the land with the intention of residing on it with his family as a homestead before the judgment lien came into existence, but immediately on such purchase took actual, open and exclusive possession, for the purpose of preparing it for such residence, did so prepare it as soon as was practicable, and as soon as it was so prepared, did so occupy it with his family. He could do nothing more, or sooner, upon his purchase, so to occupy it, than he did.

In such a case we understand that his rights under the Homestead Exemption Act attached from the time he acquired title to the lot; certainly, at least, from the time the possession was taken and used to prepare the residence. *Crawford et al. v. Richeson et al.*, 101 Ill. 351 (366); *Boyd v. Fullerton*, 125 Id. 437, and authorities there cited, to which may be added *Reske v. Reske*, 51 Mich. 541.

Appellant also urges two technical points, viz: That the allegations of the bill do not support the decree, nor show a right to any relief, and that the plaintiff in the execution was not made a party defendant.

The bill averred that complainant "purchased said real estate on the 11th day of April, 1891, and took possession thereof on said day, and now occupies said premises with his family as a homestead," and charges that defendant is proceeding to sell the premises regardless of the law of this State exempting homesteads. It is said that this is not an averment that the premises were complainant's homestead on the 8th of May when the judgment became a lien, or of any fact which would show it was. Literally and strictly taken, perhaps it is not. Defendant, however, did not see fit to demur, but answered, *denying* the fact as if it had been averred, and the case was tried and evidence received as if that were the issue. We think it too late now to urge that objection to the decree.

Nor can he, after such answer and trial without objection

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of the want of proper parties, complain of the omission of the Wilson Grocery Company. It did not prejudice appellant, nor does the decree directly affect the grocery company. Decree affirmed.

Long & Alstatter Co. v. T. J. Hill et al.

1. *Guaranty—Contract of.*—Where a company manufacturing implements entered into a contract with a person to sell the same for cash or notes, and that all notes taken should be indorsed by such person as follows—"For value received, we hereby guarantee the payment of the within note and waive protest, demand and notice of non-payment thereof," and such person having so indorsed a note taken in payment of an implement sold, *it was held* that the fact that the company sent out one of its agents to assist such person in making sales, and who assisted in making the sale in question, and advised taking the note, etc., did not make the sale of the implement sold, the sale of the company, so that the guaranty, being made after the sale, would be without consideration.

Memorandum.—Action upon a guaranty. Appeal from a judgment rendered by the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed December 2, 1892.

Copy of note sued on :

"\$23.00. No. 8481. SULLIVAN, ILLS., June 5, 1885.

For value received, on or before the first day of January, 1886, we, the undersigned, of the town of Sullivan, county of Moultrie, State of Illinois, promise to pay to the order of The Long & Alstatter Co., twenty-three dollars, payable at Sullivan, Ills., with interest at 8 per cent until due, and 8 per cent after due. Without relief from exemption, valuation or appraisement laws of this State. And if not paid when due, and suit is commenced upon this note, I promise to pay five dollars as attorney fees, in addition to the taxable costs. And it is further agreed that this note shall be due on demand if the maker attempts to move out of said county.

W. A. MARSHALL.

P. O. Address, Sullivan, Ills. Residence in city.

Indorsement: For value received, we guarantee the payment of the within note, and hereby waive protest, demand and notice of non-payment thereof.

HILL, JENKINS & Co."

SPITLER & HUDSON, attorneys for appellant.

APPELLEES' BRIEF.

Where a person is held out to the public as a general agent of a corporation, and he so represents himself, and acts as such in other matters, his acts as such, in a particular case, will bind the corporation, even though according to his secret instructions, he may have transcended his authority. *Home Life Ins. Co. v. Pierce*, 75 Ill. 426.

Starkie on Evidence, Vol. 2, page 34, says: "When the fact of agency has been proved, either expressly or presumptively, the act of the agent, co-extensive with his authority, is the act of the principal, whose mere instrument he is, and then whatever the agent says within the scope of his authority, the principal says."

The guaranty was made by a stranger to the note, and at a time long after its delivery by the maker to the holder, and at the time the guaranty was made, no consideration passed.

In *Kline v. Currier*, 14 Ill. 237, the court says: "Where it is shown that the defendant executed the guaranty after the delivery of the note, the burden of proof is upon the plaintiff to show a new express consideration therefor." *Edwards on Bills and Notes*, Sec. 318.

R. M. PEADRO, attorney for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

Appellant made agricultural implements at Hamilton, Ohio, and appellees dealt in them at Sullivan, Illinois. In the winter of 1884-5 the parties entered into a contract by which appellant was to furnish its implements to the appellees as ordered at net prices specified, to be sold by the latter in the territory indicated. Their compensation for all services in connection with such sales was to be the difference between the net prices referred to, and those for which the machines should be sold. Among the provisions contained in the agreement was the following: "Settlement for all machines to be made in cash and responsible farmer's notes, on terms above named, in same proportion

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as received. Notes to be drawn on the Long & Alstatter Co.'s blanks, with eight per cent from due, made payable in bank to the order of the Long & Alstatter Co., and indorsed by said Hill, Jenkins & Co., as follows, viz.: 'For value received we hereby guarantee the payment of the within note, and waive protest, demand and notice of non-payment thereof.' " Appellees did so indorse a note of W. A. Marshall for \$23, dated June 5, 1885, payable on or before January 1, 1886, and given for one of appellant's plows. On that indorsement this suit was brought before a justice of the peace, and taken by appeal to the Circuit Court, where it was tried without a jury, and the issue found for the defendants. A new trial was denied and judgment entered on the finding.

The defense set up was that the sale to Marshall was made against their advice by Warwick, the agent, who executed the contract for the company, and had charge of the territory, including theirs, and with whom they were to settle. It appears that when he established an agency by such a contract, he spent some time in helping the agent to sell and introduce the company's machines. He did so in this instance, was in Moultrie County on several occasions, and made other sales for them, but no other contrary to their advice. They told him Marshall's note would not be good without security, but he said that Marshall promised security and named the man. When Warwick went to find him, however, he had gone to Decatur, and the security was not obtained. Warwick did not then deliver the note to appellees, as he did in other cases, but when he came around to make settlement with them, about the first of October, he presented it and asked their indorsement, saying that without that the company would not accept it. They at first refused, but upon his statement that the sale was his and he would take care of the note so that the company should not bother them about it, consented and signed the guarantee. They then made a satisfactory settlement. Mr. Jenkins, who signed the guarantee for his firm, testified: "This note was applied as a credit on our account with the plaintiff, and for the purpose of helping to cancel our indebtedness to the

plaintiff. It canceled our indebtedness in a sum equal to the amount of this note."

It is claimed that Warwick was a general agent of the company; that the sale by him was therefore in legal effect a sale by the company, and the guarantee, indorsed after the note was delivered by the maker, was without consideration.

We do not so understand the facts. The sale was made to a farmer within the territory of appellees, and it was made for them and not for the company. If it was for more than the net price at which the company furnished the plow to them, the excess was to go to them. The contract provided that "the said Hill, Jenkins & Co. agree to forward, without additional compensation, any of the above implements during the season to parties outside of the limits of their territory as the Long & Alstatter Co. may direct;" but we do not find that it anywhere reserves to the company the right to sell or order delivery to any party within that territory. Appellees were therefore not bound to let Marshall have the plow on Warwick's word, without knowing that the price was paid or a satisfactory note given for it. In doing so they trusted to Warwick; but the company looked to them. Their contract with it required them to guarantee the note as they did. We think the finding of the Circuit Court was clearly against the law and the evidence. Its judgment will therefore be reversed and the cause remanded.

Simmons v. Nelson.

1. *Statute of Limitations—Burden of Proof—Instructions.*—Where, to a declaration on a promissory note, the defendant pleaded the statute of limitation, and the plaintiff replied that a payment had been made within the statutory period, an instruction which advises the jury that the burden of proof upon the issue made by a plea of the statute of limitations is upon the defendant, to show that the suit was not commenced within ten years after the action occurred, is erroneous. By the state of the pleadings, the plaintiff, by his replication, admits that the action was barred, unless saved by reason of the payment which he maintained the defendant had made upon the note.

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2. *Instructions—Error Will Not Always Reverse—Special Findings.*—In an action on a promissory note, the defendant pleaded the statute of limitations, and the plaintiff replied—A payment, etc. *Held*, that under the state of the pleadings, it was error to instruct the jury that the burden of proof was upon the defendant, under his plea to show that the suit was not commenced within the statutory period; but as the instruction only placed upon the defendant the burden of proving a matter already admitted by the pleading, it could not have operated to his prejudice, and, hence, not reversible error.

3. *Instructions—Refusal—Repetition.*—The erroneous refusal of the court to instruct the jury that an indorsement of a credit upon a promissory note was not evidence that a payment had been made, is cured by other instructions, explicitly telling the jury that they must find for the party insisting that the payment had been made, unless they believed from a preponderance of the evidence that it had not been made as claimed.

4. *Special Finding—Effect in Determining Influence of Erroneous Instructions.*—In determining the effect of an instruction, which erroneously shifts the burden of proof in a suit at law, recourse may be had to special findings. So where, in an action of assumpsit, the defendant pleaded the statute of limitations, and the plaintiff replied a payment, the court erroneously instructed the jury that the burden of showing that the action did not accrue within the statutory period (a matter admitted by the replication) was upon the defendant. The jury found specially in answer to an interrogatory propounded by the defendant himself, that he suit was not brought within the statutory period. *It was held*, that by such a finding it is absolutely known, the imposition of the burden of proof improperly upon the defendant by the instruction did not prevent him from prevailing upon that issue.

5. *Special Findings—Erroneous Instructions.*—Where it appears from the answers to special interrogatories that an instruction, erroneously given, has in no wise prejudiced the party complaining, the judgment will not be reversed.

6. *Promissory Notes—Indorsements—Statute of Limitations—Evidence.*—An indorsement upon a promissory note, standing alone, can not be considered as evidence, where the holder of the note is endeavoring to establish a credit for the purpose of avoiding the effect of the statute of limitations.

Memorandum.—Action on promissory notes. Appeal from a judgment for plaintiff, rendered by the Circuit Court of Hancock County; the Hon. CHAS. J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed December 2, 1892.

APPELLEE'S STATEMENT OF THE CASE.

Enos Nelson sued James E. Simmons and John H. Parker, to recover the amount due him on a promissory note.

Copy of note:

“\$576.68.

September 9, 1880.

One day after date I promise to pay to the order of Enos Nelson, five hundred seventy-six and 68-100 dollars, at Blandinsville, Illinois, value received, with interest at 8 per cent. per annum.

[Signed] JAMES E. SIMMONS,
JOHN H. PARKER.”

And on the back of which note was the following indorsement:

“Received \$45 on the within note, May 12, 1886.”

The declaration contained a special count on the note, and the common counts. The suit was brought to the March term, 1891, of the Circuit Court. At the March term, 1891, defendants pleaded the general issue and the statute of limitations. At the June term of the court, the appellant, James E. Simmons, obtained leave of the court to file a plea of usury; the cause was tried at the October term, 1891.

The jury returned a verdict for \$1043.67, the amount of the note and interest, less the payment of \$45, which was credited on the note.

Instructions Referred to in the Opinion of the Court.

Appellee's first instruction:

The court instructs the jury that the defendant has in this case pleaded the statute of limitation as a defense in this suit, and that as to his defense, the burden of the proof is on the defendant, to show, by a preponderance of the evidence, that this suit was not commenced within ten years after the note in question became due, and unless he has so shown that fact, you should find for the plaintiff upon that issue. You are instructed that said note became due on September 13, 1880.

Appellant's refused instruction:

The court instructs the jury that a mere indorsement on a note by the holder thereof is not sufficient to remove the bar of the statute of limitations, but that where said payment is denied, the plaintiff must show by a preponderance of the evidence that the said payment was made by defendant, with the express intention of having the same applied on said note.

Appellee's fourth instruction:

In order to sustain the defense of usury, it must be proven by defendants by a preponderance of the evidence, that the contract with the plaintiff was to pay him ten per cent interest, instead of eight per cent, and if the jury believe, from the evidence, that any other agreement was made than one to pay more than eight per cent interest per annum, the defendants have not made out the defense of usury.

Simmons v. Nelson.

D. MACK & SON and O'HARRA, SCOFIELD & HARTZELL,
appellant's attorneys.

SHARP & BERRY BROS., attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The appellee brought this action of assumpsit against the appellant and one Parker to recover upon a promissory note then more than ten years past due. The defendants interposed a plea of usury, and that the action was barred by the statute of limitations. The appellee traversed the plea of usury, and to the plea of the statute of limitations he filed a replication alleging that Simmons had made a payment upon the note within ten years.

Upon a hearing before a jury, a verdict was returned, and a judgment rendered against Simmons, the appellant, who prosecutes this appeal. The suit was dismissed as to Parker. The note upon its face bore a legal rate of interest, but the appellant pleaded and sought to establish by proof an agreement outside of the note for the payment of two per cent interest per annum above the legal rate. The evidence bearing upon this contention was conflicting, so much so that a determination of the truth of the controversy was peculiarly a question for the jury.

The appellee, Nelson, maintained that the appellant, Simmons, as a payment upon the note, sold and delivered to him a calf at the price of \$45, and that he accepted the same as a payment. Simmons admitted that he had sold and delivered the calf to the appellee, but denied that its price was to be taken as a payment on the note. He admitted that the calf had not been otherwise paid for, and that he had not demanded payment for it. We have examined and considered all the evidence upon this question, and are satisfied with the conclusion arrived at by the jury. It only remains to be seen whether such errors of law intervened in the course of the trial as to demand the reversal of the judgment.

The first instruction given for the appellee advised the

jury that the burden of proof upon the issue upon the plea of the statute of limitations was upon the appellant to show that the suit was not commenced within ten years after the note fell due. This instruction ought not to have been given. By the state of the pleading the appellee admitted that the action was barred unless saved by reason of the payment which he maintained the defendants had made upon the note.

The burden of producing a preponderance of evidence in support of this alleged payment was upon the appellee, not upon the appellant. The instruction, however, only placed upon the appellant the burden of proving a fact admitted by the pleading and appearing incontestably from the face of the note, and we therefore can not imagine that it operated to his prejudice. Aside from this, as the jury specially found, in answer to a question propounded at the request of the appellant, that the suit was not brought within ten years after the note fell due, it is absolutely known that the imposition of the burden of proof, improperly, upon the appellant by this instruction, did not prevent him from prevailing upon that issue. It is, however, insisted that the jury were likely to understand from this instruction that the burden of producing a preponderance of evidence upon the question of whether or not a payment had been made was upon the appellant.

Standing alone, the instruction ought not to have had that effect; and when it is remembered that the court, at the request of the appellant, gave the jury eight other instructions in which they were distinctly told that the appellee was required to establish the alleged payments by a preponderance of the evidence, it would be quite unreasonable to conclude that the jury were misled by the instruction complained of.

All that is correctly stated in instructions 4, 9 and 10, which were refused, was given in other instructions and a repetition was wholly unnecessary.

The court, though asked, refused to instruct the jury that the indorsement of the credit upon the note was not evidence that a payment had in fact been made. We under-

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stand that an indorsement of a credit upon a note can not be considered in evidence when the holder of the note is endeavoring to establish a credit for the purpose of avoiding the effect of the statute of limitations.

The instruction ought, we think, to have been given. Yet we do not think its refusal so prejudiced the appellant as to demand a reversal of the judgment. The court, in more than one of the other instructions, explicitly told the jury that they must find for the appellant, upon the issue as to the alleged payment, unless they believed from a preponderance of the evidence that the appellant sold the plaintiff the calf as, and for, a payment upon the note, and delivered the calf with the intention that its agreed price should be placed and applied as a credit upon the note. We know, moreover, from the special findings, that the refusal to give the instruction did no wrong to the appellant. The jury, in reply to a special interrogatory, found specially that the appellant sold the calf to the appellee for the sum of \$45, as a payment upon the note, and directed that the price thereof be credited upon the note as a payment thereon. It was from a consideration of these facts, and not from the indorsement upon the note, that the jury determined the issue as to the payment.

Instruction No. 4 given for the appellee is not free from objection. The principle intended to be announced by it is that the appellant was required to prove the alleged usurious contract as pleaded. It fails, however, to state correctly the contract as set out in the plea, and inaccurately states abstract rules of law relating to the effect and consequences of usury upon a contract. In answer to the second special interrogatory, propounded at the request of the appellant, the jury returned as a finding of fact that there was no agreement for the payment of two per cent interest in addition to the legal rate specified in the note, as alleged in the plea.

The appellant having failed to establish the facts set out in the plea upon which he relied as constituting an usurious contract it was wholly unimportant whether the instruction

correctly recited such facts or the principles and rule of law which the jury would have been called upon to apply, had he succeeded in supporting the plea.

We think the judgment right upon the merits and that the record is free from such error as requires a reversal. The judgment is therefore affirmed.

Folger v. Bishop.

1. *Abstract of the Record.*—An abstract prepared without regard to the rules of the court, consisting largely of mere conclusions of counsel as to the substance and effect of the testimony of the different witnesses, interspersed with arguments as to its weight, and confidential side remarks, is improper. For instance, the testimony of a witness covering eight pages of the bill of exceptions, is abstracted as follows: “It is not very material, except to show that Folger (the plaintiff in error) acted in good faith, and that he paid the costs and damages relative to a cow replevied.”

2. *Presumptions as to the Ruling of the Trial Court—Verdict.*—The presumption of law is that the Circuit Court correctly ruled, as to the law of this case, that the verdict of the jury is in harmony with the weight of the evidence and that the judgment upon the verdict was right.

Memorandum.—Writ of error to reverse a judgment rendered by the Circuit Court of Vermilion County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and the judgment affirmed. Opinion filed December 2, 1892.

PLAINTIFF'S BRIEF.

To an action of debt on an indemnifying bond, *non damnificatus* is a good plea. *Sears v. Nagler*, 18 Brad. 547. There was no particular breach of any condition of the bond assigned in the declaration. General performance, therefore, was a good plea. *Sears v. Nagler*, 18 Brad. 547.

D. D. EVANS, attorney for the plaintiff in error.

LAWRENCE & LAWRENCE, attorneys for defendant in error.

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OPINION OF THE COURT.

This is a writ of error, designed to bring before us for review a judgment rendered against the plaintiff in error in favor of the defendant in error in an action of debt.

The abstract prepared by counsel for the plaintiff seems to have been made without regard whatever to the rules of the court, and is wholly insufficient to bring before us the questions of fact which counsel apparently desires to have reviewed. The abstract consists most largely of mere conclusions of counsel for the plaintiff in error as to the substance and effect of the testimony of the different witnesses, interspersed with argument as to its weight and confidential side remarks. The testimony of W. J. Calhoun, which covers eight pages of the bill of exceptions, is abstracted as follows: "It is not very material, except to show that Folger (the plaintiff in error) acted in good faith, and that he paid the costs and damages relative to a cow replevied."

Pages 9 and 10 of the record are thus abstracted: "Pages 9 and 10, questions were asked relative to going to Dana, Indiana, without showing any necessity for going, or a request."

The testimony of the defendant in error, which occupies sixteen pages of the record, is presented by the abstract as follows:

"Testimony of Bishop on rebuttal principally confined to denying the testimony of Folger, Patten, Leggett, Lee, Davis and Fisk."

The testimony of William French, one of the witnesses for the defendant in error, appears in the abstract in this manner: "William French's testimony. It displays considerable feeling but not much sense and has not much weight. It is not considered essential to abstract it." As to the instructions given, refused and modified, of which complaint is made, the abstract is as follows:

"They are too numerous and lengthy to be set out in the abstract."

The presumption of law is, that the Circuit Court cor-

rectly ruled as to the law of the case, and that the verdict of the jury was in harmony with the weight of the evidence, and that the judgment of the court upon the verdict was right. The presumption must prevail as against all that is properly brought to our notice by the abstract.

The plaintiff in error filed ten pleas to the declaration, to one of which, the fourth, a demurrer was sustained. This is complained of as error. The pleas are not set out in the abstract, but we have examined the record and think the demurrer was properly sustained to this plea and that it might with great propriety have been extended to and sustained against at least three other of the pleas.

All proper grounds of defense, including that endeavored to be interposed by the fourth plea, are fully presented by other pleas upon which the issues were made.

It may not be amiss to say that the evidence found in the record of the case does not warrant the conclusion that upon the merits of the controversy the verdict of the jury or the judgment of the court ought to have been different.

The judgment is affirmed.

City of Mattoon v. Bowles.

1. *Assignment of Errors—Abandonment.*—Where an alleged error of the court in giving an instruction is assigned for error, but no specific objection to such instruction is made in the brief of the party complaining, nor any reference to such instruction, such assignment must be considered as waived or abandoned.

Memorandum.—Trespass on the case. Appeal from a judgment rendered by the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the May term A. D. 1892, and affirmed. Opinion filed December 2, 1892.

EMERY ANDREWS, attorney for appellant.

I. B. CRAIG, attorney for appellee.

OPINION BY THE COURT.

The judgment below was against the appellant city in the sum of \$150 for damages occasioned to the premises of the appellee by water caused to flow thereon wrongfully, by reason of certain ditches constructed by the city.

Alleged errors of the court in giving instructions to the jury in behalf of the appellee is assigned for error, but no specific objection to such instructions or any of them is made in the brief, nor does the brief contain any reference to such instructions. Such assignment must be considered waived or abandoned. *Seaton v. Ruff*, 29 Ill. App. 235.

The only grounds for reversal presented by the brief of counsel for the appellant city are, (1) that the appellee purchased the premises in question after the ditches had been constructed, with full knowledge thereof, and is for that reason estopped from claiming or recovering damages; (2) that the damages allowed are excessive. We have read and carefully considered the testimony, and while it is conflicting, we think there is evidence, if accepted by the jury, as it seems to have been, sufficient to sustain the view that the ditches had not been constructed when the appellee became interested as a purchaser in the premises. Moreover, it appears clearly and practically without denial that the city deepened the ditches after the appellee became the owner of the lot, and thereby materially increased the flow of the water, and the consequent injury to the lot.

We see no reason under the evidence to regard the damages as excessive.

The judgment must be and is affirmed.

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Consolidated Tank Line Co. v. Collier et al.

1. *Attachment, Garnishment and Interpleader—Non-resident Litigants—Rights of Domestic Creditors.*—The plaintiff, a corporation, under the laws of Ohio, sued out an attachment from the Hancock County Circuit Court, against the defendants, who were residents of

Iowa, and summoned a number of persons residing in Hancock County, as garnishees, who answered, admitting certain sums due, etc. J. F. Smith interpleaded, claiming the amounts due from the garnishees. A demurrer was overruled and judgment rendered upon the plea of interpleader. It appeared from the plea, that the defendant, by instruments in writing, duly executed, acknowledged, delivered and recorded, according to the laws of Iowa, had, prior to suing out the attachment, for the purpose of securing certain creditors, transferred their property, including the debts garnished, to Mr. Smith, and that, before the writ issued, he had taken possession of the merchandise and books of accounts, and notified the garnished debtors of his rights in the premises. Upon appeal, *it was held* that the laws of Iowa governed the transaction, so that, if legal there, it is legal in this State, unless the rights of domestic creditors are unfavorably affected.

2. *Non-resident Litigants—Resident Garnishees—Rights of Creditor.*—Where the plaintiff and defendant in an attachment proceeding are non-resident, the fact that persons indebted to the defendant, and summoned as garnishees, are residents, does not change the situation. The right to collect the amounts due from such persons as debtors, pertains to, and follows, the creditors, and the *situs* of the property held by the creditor is the residence of the creditor.

Memorandum.—Attachment for the collection of a debt. Garnishee process and interpleader. Appeal from the Circuit Court of Hancock County; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed December 2, 1892.

STATEMENT OF THE CASE.

Prior to December 10, 1890, the co-partnership of Collier, Robertson & Hambleton was engaged in business in Keokuk, Iowa. While so engaged sundry persons, residents of Illinois, became indebted to them, which indebtedness was evidenced by open accounts in the books of said firm. On the 10th day of December, 1890, said firm of Collier, Robertson & Hambleton, by two instruments in writing, transferred to J. F. Smith, as trustee, certain personal property to secure to the beneficiaries therein named sundry debts due and owing by the firm of Collier, Robertson & Hambleton, the description as applied to choses in action in the first conveyance being as follows, to-wit: "Also all notes and accounts belonging to the grantors, whether in process of collection or not. * * * The intention being

Consolidated Tank Line Co. v. Collier.

to convey all personal property, choses in action of the grantors, as fully as if each item was mentioned, and including all books of account, and the accounts therein contained;" and in the second instrument occurs the following:

"Also, all notes, accounts, account books and accounts therein, including judgments belonging to said firm, and including all the property in and about said premises belonging to the grantors, whether named herein or not." Each of the instruments was, on the day of its execution, filed for record in Lee County, Iowa, at Keokuk.

The Consolidated Tank Line Company had not only constructive notice of the existence of said instruments as given by the fact of recording, but also had actual notice of the acknowledgment, execution and delivery of same.

Under and by virtue of said instruments, and under and by virtue of the laws of the State of Iowa, there was transferred and set over unto J. F. Smith, as trustee, the debts due from the several garnishees in this case. Under the instruments said J. F. Smith, as trustee, took possession of the books of accounts and evidences of indebtedness from the several garnishees, and prior to the service of garnishment in this case notified each of the several garnishees that the several sums due from them to Collier, Robertson & Hambleton had been assigned to J. F. Smith, trustee, and that he was entitled to receive the sums due from them.

Smith accepted the trust created by the instruments, and took the open and manual possession of the property, and control of the evidences of the indebtedness of the several garnishees to the firm of Collier, Robertson & Hambleton. The Consolidated Tank Line Company is engaged in business in the city of Keokuk, and the claim sued on by it grows out of a transaction arising in the State of Iowa. To the interplea, the Consolidated Tank Line Company filed a demurrer, which was overruled, and the tank line company prosecutes an appeal.

APPELLANT'S BRIEF.

The mortgages were not recorded in Illinois. There was no attempt to comply with the laws of Illinois in that re-

gard. A lien of attachment on personal property in Illinois is superior to a lien of prior unrecorded mortgage. *Green v. Van Buskirk*, 7 Wall. (U. S.) 139.

Execution lien is superior to lien of chattel mortgage acknowledged before justice of the peace out of mortgagor's precinct and not recorded. *Stephenson v. Browning*, 48 Ill. 78.

"Mortgages must be recorded in the county where the mortgagees reside, if they reside in the State; if they do not reside in the State, then they must be recorded in the county where the property is situated." *Jones on Chattel Mortgages*, Sec. 252.

The property in question was in Illinois, and the mortgages not being recorded here, we submit that they are not good as against appellants.

Actual notice does not relieve from the duty to record mortgage to make a valid lien. Actual notice makes no difference. *Porter v. Dement*, 35 Ill. 478; *Sage v. Browning*, 51 Ill. 217; *Self v. Sanford*, 4 Brad. 328.

A debtor is only allowed to place his property beyond the reach of his creditors by making a general assignment of all his property, when he does so for the benefit of the creditors, by devoting it fairly to the payment of his debts, and not with a view to his own advantage. *Gardner et al. v. Commercial Nat. Bank*, 95 Ill. 306; *Nesbitt et al. v. Digby et al.*, 13 Ill. 387; *Phelps et al. v. Curts et al.*, 80 Ill. 113; *Hardin v. Osborne*, 60 Ill. 93.

In New York, and in most, if not all, of the United States, it has been held that the title acquired under foreign bankrupt or insolvent proceedings, will not prevail against the rights of attachment creditors, where the property is situated. *Bishop on Insolvent Debtors*, Sec. 236; *Harrison v. Sterry*, 5 Cranch (U. S.), 289; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Pleastro v. Abraham*, 1 Paige (N. Y.), 236; *Holmes v. Remsen*, 20 Johns. (N. Y.) 229; *Hoyt v. Thompson*, 5 N. Y. (1 Seld.) 320; *Alyt v. Thompson*, Ex., 19 N. Y. 226; *Kelly v. Crapo*, 5 N. Y., 16 Wall. (U. S.) 610; *Osborn v. Adams*, 18 Pick. (Mass.) 245; 2 Kent's Com. 405-408.

Consolidated Tank Line Co. v. Collier.

CRAIG, McCRARY & CRAIG, and SHARP & BERRY BROS.,
attorneys for appellant.

APPELLEES' BRIEF.

The laws of Iowa determine the validity of the instruments and their execution. It is alleged, in the plea, that said instruments were made in all respects in conformity with the laws of Iowa, and that they were duly acknowledged and delivered and recorded, in accordance with the laws of said State.

This allegation is admitted by the demurrer, and hence, if the laws of Iowa control, is conclusive against appellant's theory that the instruments are invalid, because, if properly executed and valid in Iowa, they are valid anywhere. *Lipman v. Link*, 20 Ill. App. 361.

All parties to this controversy were engaged in business in the city of Keokuk, Iowa, at the time of the execution of the instruments in controversy. There are no residents or citizens of the State of Illinois, whose rights are to be passed upon by this court. We therefore contend that the validity of the transfer is to be governed by the law of the place where same was executed. The Supreme Court of Illinois has recently had occasion to construe this question. The case of *Heyer v. Alexander*, 108 Ill. 385, held that foreign assignments had no extra-territorial effects as to the claim of resident debtors of the State of Illinois. The case of *May v. First National Bank*, 122 Ill. 551, held that foreign assignments, so long as the same did not interfere with the rights of resident creditors of Illinois, would be recognized and sustained by the courts of Illinois and would be governed by the laws of the place where they were executed. See also *Chafee v. Fourth National Bank*, 71 Maine 514, as follows: "The true rule of law and public policy is this: That a voluntary assignment made abroad, inconsistent in substantial respects with our statute, should not be put in execution here, to the detriment of our citizens, but that for all other purposes, if valid by the *lex loci*, it should be carried fully into effect." See also *Guillander v.*

Howell, 35 N. Y. 657; Woodward v. Brooks, 128 Ill. 224; Caskie v. Webster, 2 Wall., Jr., 131; Lipman v. Link, 20 Ill. App. 361; Smith et al. v. Whitaker et al., 23 Ill. 367; Juilliard & Co. v. May, 130 Ill. 87.

JAMES C. DAVIS, F. T. HUGHES and O'HARA, SCOFIELD & HARTZELL, attorneys for appellees.

OPINION BY THE COURT.

The appellant, a corporation under the laws of the State of Ohio, sued out of the Circuit Court of Hancock County a writ of attachment against Collier, Robertson & Hambleton, a partnership doing business in and resident of the State of Iowa.

A large number of persons residing within the said county of Hancock being indebted to said Collier, Robertson & Hambleton were summoned as garnishees and filed answers admitting certain sums due, etc., etc.

At the proper stage in the proceedings J. F. Smith was allowed to interplead, claiming the right to the money due from said garnishees. A demurrer was interposed by appellant to the interplea so filed by said Smith, and was overruled. Judgment was rendered accordingly, from which the present appeal is prosecuted. It appears from the averments of the plea that Collier, Robertson & Hambleton, by two instruments in writing, transferred their stock of merchandise, situate in Keokuk, Iowa, and all their bills receivable, including the several debts involved in this case, to the said J. F. Smith prior to the suing out of said writ of attachment, and that Smith, before the writ issued, took possession of the merchandise and of the books of account, and that he notified the various debtors of the firm, including the said garnishees, of his rights in the premises.

The instruments thus executed were for the purpose of securing certain creditors therein named. It is averred in the plea that they were duly executed, acknowledged, delivered and recorded in accordance with the laws of the State of Iowa, and were efficient for the purpose designed.

Phenix Ins. Co. v. Woland.

At least, we think the averments are in substance to that effect. If so, then the law of Iowa will govern the transaction, so that if legal there it will be legal here, unless the rights of domestic creditors would be unfavorably affected. *Lipman v. Link*, 20 Bradw. 359; *Woodward v. Brooks*, 128 Ill. 224.

The fact that the garnishees reside in this State does not change the situation. The right to collect the sum due from the debtor pertains to, and follows the creditors, and the *situs* of the property thus held by the creditor is the residence of the creditor. 2 Kent, 429; *Cooper v. Bcers*, 143 Ill. 25, opinion filed at Springfield, November, 1892.

Much argument has been made as to whether it is really well pleaded that the transfer was valid under the law of Iowa, but we deem it unnecessary to follow the discussion.

Whether so valid or not, there was an equitable assignment of the choses in action, and there was notice to appellant as well as to the garnishees. Such equitable assignment will be protected in this State in garnishee proceedings. *Hodson v. McConnel*, 12 Ill. 170; *Carr v. Waugh*, 28 Ill. 418.

We find no error in the record, and the judgment will be affirmed.

Phenix Insurance Co. v. Woland.

1. *Verdict Against the Preponderance of the Evidence.*—Where the evidence is conflicting, and the jury choose to accept the version of one party, the court will not ordinarily reverse the finding.

2. *Instructions—Repetition.*—It is not error to refuse an instruction the substance of which is contained in other instructions given for the same party.

Memorandum.—Action upon a promissory note. Appeal from the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed December 2, 1892.

The opinion states the case.

S. L. WALLACE, attorney for appellant.

E. D. BLINN, attorney for appellee.

OPINION BY THE COURT.

This suit was on a note for \$14.50, given by appellee to appellant, commenced before a justice of the peace and removed by appeal to the Circuit Court, where, upon a trial by jury, there was a verdict for appellee. The Circuit Court denied a motion for new trial and rendered judgment for costs against the appellant.

It is urged, mainly, by counsel for the appellant, that the finding of the jury is against the preponderance of the evidence. The defense was a failure of consideration; and the evidence was certainly very much in conflict. The jury chose to accept the version of the appellee, and we are not able to say that they were without warrant in so doing.

It is needless to enter into a statement of the testimony or to discuss it in detail. We can not, in our opinion, reverse the judgment on this ground.

It is assigned as error that the court refused to give instructions Nos. 5 and 6 asked by appellant. We think these instructions did not fully or perfectly state the facts in controversy and for that reason might have been refused, and further, that all there is in them which appellant was entitled to was embraced in the fourth instruction that was given. We think there was no error in the instructions given for appellee and that upon the whole case there is no occasion to interfere with the judgment of the Circuit Court, which is therefore affirmed.

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48 546

**Trustees of the Permanent Fund of the Illinois Chris-
tian Missionary Convention v. T. N. Hall,
Admr. de bonis non.**

1. *Gifts*—Causa Mortis and Inter Vivos.—A gift *inter vivos* is only enforced when it is a completed gift. The donor must relinquish absolutely

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and irrevocably present and future dominion and power over the subject-matter of such gift. True, the delivery may be in escrow to vest upon the happening of such an event, but this contingency must not be at the mere will or pleasure of the donor. If such a gift is not completed during the lifetime of the donor, his death revokes the part which has been performed.

2. *Gifts Inter Vivos—Promissory Note—Consideration.*—John O. Bolin, a man of a religious turn of mind, conferred with the officers and members of the board of trustees of the Illinois Christian Missionary Convention, relative to making a provision for the institution. About January, 1886, he went to J. W. Boren, and handed him certain papers and said to him, “Squire, if anything happens to me, mail these letters.” One of them was directed to A. McLean, and stamped. The others were all inside of a blank envelope. Mr. Bolin said to Boren, “Inside, the blank one, will tell you what to do.” Mr. Boren took the letters, wrote across them the name of John O. Bolin, and said to him, “If anything happens to me, these belong to you.” In January, 1889, Bolin died. Boren mailed the letter directed to A. McLean to him. It contained a note for two thousand dollars. On opening the blank envelope, among others, was another envelope directed to N. S. Haynes, evangelist, etc., properly directed and stamped. This letter Boren mailed, and it was received by Mr. Haynes, and contained a note for two thousand dollars, of which the following is a copy:

\$2,000.

MILTON, Pike Co., Ill.

Ten years after date I promise to pay to the trustees of the permanent fund of the Illinois Christian Missionary Convention two thousand dollars, (\$2,000) without interest, for such fund, and in consideration of one dollar (\$1) and other valuable considerations, I hereby agree in the event of my death before the maturity of this note, said note shall in that case become absolutely due and payable.

J. O. BOLIN.

Edward N. French was appointed administrator of the estate, and the trustees commenced suit against him. He pleaded general issue and want of consideration. A trial was had before the court. Upon the hearing of the case the court gave judgment against the plaintiff for costs, holding that the note was never delivered, and was without consideration. Upon appeal it was held that the judgment of the Circuit Court was correct.

3. *Gifts—Causa Mortis and Inter Vivos and Otherwise.*—The experience of ages has demonstrated the wisdom and the necessity of guarding such bequests or gifts of property against fraud, under influence and imposition. All the States of our Union have statutes designed to supply such safeguards. If a person desires to make a solemn disposition of his property to take effect only after his death, yet leaving him, so long as he may live, fully empowered to change such disposition, or to apply its subject-matter to his own use or to any other purpose, he must do so by a will, in strict conformity with the statutory enactments regulating such bequests.

Memorandum.—Action upon a promissory note. Appeal from a judgment rendered by the Circuit Court of Pike County; the Hon. OSCAR P. BONNEY, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed December 2, 1892.

STATEMENT OF THE CASE BY THE COURT.

It appears from the evidence that in January, 1885, or 1886, the deceased, John O. Bolin, came to the office of John W. Boren, and handed him two envelopes, saying at the same time, "'Squire, if anything should happen, mail these letters." One of these envelopes was addressed to A. McLean, secretary of the Foreign Christian Missionary Society, and the other one was blank. Bolin said further: "Inside the blank one will tell you what to do." Boren took the two envelopes and placed them in a large envelope, and sealed it, and wrote Mr. Bolin's name across it. Mr. Bolin looked on while his name was being written across the envelope, and at the same time Boren said to him, "If anything happens to me, this is yours." After this no mention of the matter was ever made by either of these parties to the other.

Shortly prior to the death of Mr. Bolin, which occurred on January 15, 1889, Mr. Boren called on him, and asked him if there was anything he could do for him in the way of business, and he replied, "Nothing; everything is all right." In this conversation no mention was made of the notes. Immediately after Mr. Bolin's death, Boren opened the envelope which he addressed to Mr. Bolin, and also the blank envelope which it contained, and found that the blank envelope contained five envelopes, sealed and stamped, and addressed to the following parties: One to Miss Callie Buckhart, Holden, Mo.; one to N. S. Haynes, corresponding secretary of the permanent fund of the Illinois Christian Missionary Convention; one to the treasurer of the Eureka College; one to J. W. Boren, and one to the deacons of the Christian Church, of Milton. Boren mailed or delivered all of these envelopes, including the one to A. McLean, at once. The envelope directed to McLean contained two notes, one of which is the note sued on in the

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case of the Foreign Christian Missionary society against appellee, and the other was a similar note for the sum of \$1,000, payable to the Christian Woman's Board of Missions. The envelope addressed to N. S. Haynes contained the note sued on in this case without any note or letter of explanation. The note was written upon a blank form sent by Mr. McLean to Mr. Bolin by mail, at the request of the latter. The note is as follows:

MILTON, PIKE Co., ILL., August 24, 1884.

Ten years after date I promise to pay to the trustees of the permanent fund of the Illinois Christian Missionary Convention, two thousand dollars (\$2,000), without interest, for said fund, in consideration of one dollar (\$1) and other valuable consideration. I hereby agree that in the event of my death before the maturity of this note, said note shall then in that case become absolutely due and payable.

(Signed) J. O. BOLIN.

At one time, when in attendance upon an annual meeting of the appellant convention, held at Eureka, Illinois, Mr. Bolin said to Mr. Haynes, then a member of appellant's executive board, that his health was not good, and he might not live long, and he desired to arrange his affairs soon, and that he had visited Eureka for the special purpose of conferring with him (Haynes) relative to the disposition of his property. Haynes suggested that he first provide for his wife. Bolin replied that he had fully arranged in his mind as to that; that his wife would be amply provided for, and that he thought he ought to devote about \$6,000 to Christian work. Haynes suggested that Eureka College and the appellant convention were commendable organizations, and worthy his consideration, and suggested that \$4,000 donated to the college, and \$2,000 to the missionary convention would be worthily bestowed. Bolin and Haynes had further conversation, but Mr. Haynes was unable to recall it in detail, but said it was about a will making bequests.

Neither Haynes nor McLean nor any other person connected with either of the missionary societies, or the appellant convention, knew of the existence of the notes until

they were received from Bolin through the mails. It does not appear that the appellant convention or either missionary society incurred liability, or expended any moneys upon the faith of a donation from Bolin, but such organizations were then each engaged in the beneficent work for which they were created, and were relying for funds wherewith to carry on the work, upon donations, which it was expected would, from time to time, without their knowledge or solicitation, be made and bestowed upon them.

The case was, upon these facts, submitted to the court without the intervention of a jury, and the finding and judgment being adverse to the appellant, the record was brought here by appeal for review.

APPELLANTS' BRIEF.

While the rule of law is that a note or bill is not the subject of a gift *inter vivos* by the maker, an exception is often made in favor of notes by way of subscription for the endowment or other aid of public charities, religious societies or educational institutions. Randolph on Commercial Paper, Vol. 2, Sec. 455.

A note for a gift to the trustees of an orphan school having authority to receive funds and apply them to the charitable uses contemplated, has been held to be valid and binding on the maker. 2 Randolph on Commercial Paper, Sec. 455; Trustees of Orphan School v. Fleming, 10 Bush. (Ky.) 234; Collier v. Baptist Education Society, 8 B. Mon. (Ky.) 68.

The accomplishment of the object of an educational institution is a sufficient consideration for the note given it. 2 Randolph on Commercial Paper, Sec. 455; Roche v. Roanoke Seminary, 56 Ind. 198; Wesleyan Seminary v. Fisher, 4 Mich. 515.

The fact that the purpose for which subscriptions to a charitable fund was made, are being executed, forms a sufficient consideration for the subscriber's note. 2 Randolph on Commercial Paper, Sec. 455; Amherst Acdy. v. Cows, 6 Pick. (Mass.) 427; Simpson College v. Bryan, 50

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Iowa, 293; Roberts v. Cobb, 31 Hun (N. Y.), 150; George v. Harris, 4 N. H. 533.

A promissory note given in payment of a subscription or to specify a promise of subscription is a valuable consideration. Vierling v. Horton, 27 Ill. App. 264; Robertson v. March et al., 3 Scam. (Ill.) 198; Cross v. Pinckneyville Mill Co., 17 Ill. 54; T. & P. R. R. Co. v. McNeely, Adm., etc., 21 Ill. 71; Pryor et al. v. Cain, 25 Ill. 292; Griswold v. Board of Trustees, etc., 26 Ill. 41; McClure v. Wilson, 43 Ill. 356; Trustees of Ken. Bap. Educational Soc. v. Carter, 72 Ill. 247; Whitsitt v. Trustees of Pre-emption Presbyterian Church, 110 Ill. 131; Johnston v. Ewing Female Seminary, 35 Ill. 518; Willard v. Trustees, etc., 66 Ill. 55.

While delivery is essential to the validity of a promissory note, a delivery may be made to one person for another or for several others. 2 Randolph on Commercial Paper, Sec. 807; Borneman v. Sidlinger, 15 Me. 429.

And the intended donee may afterward recover it from such depositary. Coutant v. Schuyler, 1 Paige (N. Y.), 316; Wells v. Tucker, 3 Binney (Penn.), 366.

The delivery to the intended donee by the intermediate holder of the promissory note may be made after the giver's death, and such a gift may be even handed back to the donor to keep, and to collect for the donee. 2 Randolph on Commercial Paper, Secs. 807, 808; Sessions v. Moseley, 4 Cush. (Mass.) 87; Grover v. Grover, 24 Pick. (Mass.) 261; Southerland v. Southerland, 5 Bush (Ky.), 591.

A bill or note, as well as a deed, may be delivered as an escrow, that is, to a third person, and held until a certain event happens or conditions are complied with, and the liability of the party commences then as soon as the event happens, or the conditions are fulfilled, and without actual delivery by the depositary to the promisee. And it matters not that the actual delivery is not designed to take place until after the death of the promisor. The instrument, whether negotiable or otherwise, is nevertheless valid. Daniel on Negotiable Instruments, Sec. 68; Couch v. Meeker, 2 Conn. 302; 1 Parsons, N. & B., 51; Taylor v.

Thomas, 13 Kan. 217; Giddings v. Giddings, Adm'r, 51 Vt. 227; Belden v. Carter, 4 Day (Conn.), 66; 1 Randolph on Commercial Paper, Secs. 223, 227; also Seavey v. Seavey, 30 Ill. App. 641; Stone v. Hackett, 12 Gray (Mass.), 227; Martin v. Funk, 75 N. Y. 134; Minor v. Rogers, 40 Conn. 512; Smith v. Ossipee Savings Bk., 9 Atl. Rep. (N. H.) 972; Gerrish v. New Bedford Inst., 128 Mass. 150; Forbes, Adm'r, v. Jason, Adm'x, 6 Brad. 395.

Where money, personal property or notes are delivered to one person as a gift to another, to be delivered in the future, it is unnecessary to the validity of the gift that the donee should assent thereto. In such cases the assent will be presumed. Giddings v. Giddings, 51 Vt. 227; Stone v. Hackett, 12 Gray (Mass.), 227; Seavey v. Seavey, 30 Ill. App. 641.

A. G. CRAWFORD, attorney for appellants.

APPELLEE'S BRIEF.

Delivery is essential to the validity of every gift, and not even a court of equity will interfere to enforce a merely intended or promised gift. 1 Parsons on Contracts, 234, and cases cited; Bishop on Contracts, Sec. 82, and cases cited; People v. Johnson, 14 Ill. 342; Am. & Eng. Enc. of Law, Vol. 8, p. 1314 and cases cited. Delivery is necessary to perfect a promissory note. Story on Promissory Notes, Sec. 9; 1 Randolph on Commercial Paper, Sec. 216; Parsons on Notes and Bills, Sec. 7, p. 48; Tiedeman on Commercial Paper, Sec. 34; Pearson v. Pearson, 7 Johns. (N. Y.) 26; 2 Am. & Eng. Enc. of Law, 242.

A donor's own note can not be the subject of a *donatio causa mortis*. 3 Redfield on Wills, 336; Vol. 1, Parsons on Notes and Bills, 179, and Vol. 2, 55; Tiedeman on Commercial Paper, Sec. 160; 1 Woerner's Am. Law of Administration, Sec. 59; Bowers v. Hurd, 10 Mass. 427; Parish v. Stone, 14 Pick. (Mass.) 198; 8 Am. & Eng. Enc. of Law, 1343.

To constitute a gift *inter vivos* there must be a gift absolute and irrevocable, without any reference to its taking

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effect at some future period. The donor must deliver the property and part with all present and future dominion over it. *Roberts v. Draper*, 18 Ill. App. 157; *Dale v. Lincoln*, 31 Me. 422; *Northrup v. Hale*, 73 Id. 66; *Robinson v. Ring*, 72 Id. 140; *Grover v. Grover*, 24 Pick. (Mass). 261; *Jackson v. 23d St. Ry.*, 88 N. Y. 520; *Richardson v. Hadsall*, 106 Ill. 476; *Selleck v. Selleck*, 107 Ill. 389.

A gift in the nature of a testamentary bequest can only become operative when executed by the donor in writing in conformity with the statute of wills. 3 *Redfield on Wills*, 348; *Forbes v. Williams*, 15 Ill. App. 305; 1 *Woerner's Am. Law of Administration*, Sec. 63.

If a party delivers his own promissory note as a gift, it is but a promise to pay a sum certain at a future day; and such promise can not be enforced either in law or equity. It can not be enforced against the maker during his life, and after his death his representatives can defend against it on the ground of no consideration. *Blanchard v. Williamson*, 70 Ill. 647; *Arnold v. Franklin*, 3 Ill. App. 141; *Forbes v. Williams*, 15 Brad. 305; *Williams v. Forbes*, 114 Ill. 167; 2 *Kent's Com.* 438; *Am. & Eng. Enc. of Law*, 1320, and cases cited.

The only exception to the above rule is where notes are given by way of voluntary subscription to raise a fund or promote an object; and even then they are open to the defense of a want of consideration, unless money has been expended or liabilities incurred which, by legal necessity, must cause loss or injury to the person so expending money or incurring liability if the notes are not paid. 1 *Parsons on Notes and Bills*, 202; 1 *Parsons on Contracts*, 453; *Tiedeman on Commercial Paper*, Sec. 161; *Simpson Cen. College v. Tuttle*, 71 Iowa, 596.

Our own courts have repeatedly held that the promise in such cases stands as a mere offer, and may, by necessary consequence, be revoked at any time before it is acted upon, and the death of the promisor before the offer is acted upon is a revocation of the offer. *McClure v. Wilson*, 43 Ill. 356; *Trustee v. Garvey*, 53 Ill. 401; *Baptist Ed. Society*

v. Carter, 72 Ill. 247; Pratt, Adm'x, v. Trustees, etc., 93 Ill. 475; Beach v. M. E. Church, 96 Ill. 177.

H. D. L. GRIGSBY and HARRY HIGBEE, attorneys for appellee.

OPINION BY THE COURT.

When the deceased deposited the note with Mr. Boren, he was under no apprehension of death other than that general expectancy of dissolution, soon to occur in the course of nature, which all persons of his age so reasonably entertain. In his case, perhaps, this general expectation of death was aroused and quickened by his failing health. Otherwise, he was in no fear of death, immediate or remote. Gifts, made under such circumstances, can not be regarded as *donatio causa mortis*. 2 Blackstone Com. 514; Story Eq. Juris. Sec. 607 a.

A gift *inter vivos* is only enforced when it is a completed gift. The donor must relinquish, absolutely and irrevocably, present and future dominion and power over the subject-matter of such a gift. True, the delivery may be in escrow, to vest upon the happening of an event, but this contingency must not be at the mere will or pleasure of the donor. His dominion and right of control must cease before such a gift becomes absolute and fixed, so that it may be enforced at law. Jackson v. Railway Co., 88 N. Y. 520; 8th Am. and Eng. Ency. of Law, page 1313.

If such a gift is not completed during the lifetime of the donor, his death revokes the part which has been performed. 8 Am. and Eng. Ency. *supra*.

The decedent procured from the appellant convention, a blank form for a note, for the payment of money to it. This he signed, but instead of delivering it to the appellant, as a binding obligation, he deposited it with one who was to act for him, and retain it during his lifetime. Manifestly, he intended to keep the note within his own control, so that he could repossess himself of it, if he chose so to do. To our mind, it clearly appears, from the evidence, that the deceased did not intend to irrevocably invest the appellant

with legal power to enforce against him payment of the sum of money mentioned in the note. He did not know but that his life might be prolonged, or, for other reasons, he might need, or prefer to otherwise apply and appropriate, his means. At any rate, he did not choose to bind himself absolutely to pay it to the appellant during his lifetime. He left the gift incomplete.

It is insisted, however, that the evidence conclusively shows that he did intend to bestow the money upon the appellant, after his death, and that he executed the note and delivered it to Mr. Boren, with instructions to deliver it to the appellant after his death, for the purpose of effecting that intent; that upon his death-bed, his words and conduct were such as to confirm and ratify his former act, and that in pursuance thereof, the note was delivered to the appellant, who rightly possesses it and may lawfully enforce its payment. If it be conceded that all this is proven, it only appears that the deceased desired, and attempted to make, a disposition of his property to take effect only after his death. This he might lawfully do, but not by means of an undelivered note.

The experience of ages has demonstrated the wisdom and the necessity of guarding such bequests, or gifts of property, against fraud, undue influence, and imposition. All the States of our Union have statutes designed to supply such safeguards. If one desires to make a solemn disposition of his property, to take effect only after his death, yet leaving him so long as he may live fully empowered to change such disposition, or to apply its subject-matter to his own use, or to any other purpose, he must do so by a will executed in strict conformity with the statutory enactments regulating such bequests. *Redfield on Wills*, Vol. 3, 348; *Cline v. Jones*, 111 Ill. 563; *Olney v. Howe*, 89 Ill. 556. The note in question can not be received as a testamentary bequest and given the force and effect of a will, under our statute, providing for the execution of such instruments.

We think the judgment of the Circuit Court correct. It is affirmed.

**The Foreign Christian Missionary Society v. T. N. Hall,
Admr. de bonis non of the Estate of
John O. Bolin, deceased.**

The facts same as preceding case, etc.

Memorandum.—Suit on promissory note. Appeal from the Circuit Court of Pike County; the Hon. OSCAR P. BONNEY, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed December 2, 1892.

A. G. CRAWFORD, attorney for appellant.

H. D. L. GRIGSBY and HARRY HIGBEE, attorneys for appellee.

OPINION BY THE COURT.

The material facts affecting the right of the appellant society herein and the questions of law arising thereon are the same as in the case of the trustees of the Illinois Christian Missionary Convention v. T. N. Hall, Admr. *de bonis non* of the estate of John O. Bolin, deceased. In accordance with the views expressed in our opinion filed in the last named case the judgment in this case is affirmed.

Leeper v. Greensfelder et al.

1. *Assignments for the Benefit of Creditors.*—An instrument which, in terms, assumes to assign certain choses in action, mentioned therein, to a person, requiring him to convert the same into money, and to apply the proceeds to certain specified debts, including a debt due to such person, is an assignment for the benefit of creditors.

Memorandum.—Petition to have an instrument declared a voluntary assignment. Appeal from a decree rendered by the Circuit Court of Cass County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed December 2, 1892.

Leeper v. Greensfelder.

APPELLANT'S STATEMENT OF THE CASE.

On March 22, 1892, the appellees filed their petition in the County Court of Cass County, asking that court to take jurisdiction of an alleged assignment for the benefit of creditors, made by William W. Dick to the appellant. The appellant and Dick filed their demurrer to the petition, which the County Court overruled. On an appeal to the Circuit Court, the County Court was affirmed, and the record is brought here by appeal.

Copy of the instrument in question:

I hereby assign to A. A. Leeper my books of account and claims evidenced thereby for the following purposes, to wit: to be collected by him or by legal process, if necessary, and the proceeds shall be disposed of as follows:

- 1st. To pay the expenses and costs of collecting the same.
- 2d. To pay one note executed by the undersigned to J. E. Allison for the sum of three hundred and twenty-seven dollars and interest thereon.
- 3d. To pay any deficiency or balance that may be due to Bowman, Haynes & Co., from the undersigned.
- 4th. To pay any deficiency or balance that may be due to A. J. McDonald, from the undersigned.
- 5th. To pay A. A. Leeper the sum of four hundred dollars, now due him as fees and expenses for legal services heretofore rendered to the undersigned, and in case this assignment is attacked, or suits brought against the undersigned, to pay the further sum of two hundred dollars for services to be rendered in and about such matters.
- 6th. Whatever shall remain after these several payments, to be paid to the undersigned.

Dated March 1, 1892.

W. W. DICK.

A. A. LEEPER, appellant, *pro se*.

R. W. MILLS, and J. N. GRIDLEY, attorneys for the appellees.

OPINION BY THE COURT.

The sole question in this case is whether the instrument set forth in the petition should, under the facts disclosed by the petition, be regarded as an assignment for the benefit of creditors. The County Court and the Circuit Court each answered the question in the affirmative, and we are disposed to agree with the conclusion thus reached. It is

argued by appellant that the instrument was but a revocable power of attorney, and transferred no title to the property therein described, and this seems to be the ground upon which he relies to set aside the judgment appealed from.

In terms the instrument assumes to assign the choses in action mentioned to the appellant, requiring him to convert the same into money, and to apply the proceeds to the payment of certain specified debts, including that due to the appellant.

Thus the appellant was invested with a trust, which was for the benefit of himself and the other named creditors.

We think the title was transferred, as between the parties to the instrument, and that the assignee not only had power to appropriate the property for the purposes set forth, but the power was irrevocable so far as the assignor was concerned. The petition shows by sufficient averment that by this instrument the maker disposed of all his estate for the benefit of creditors, and in view of the construction placed upon the Assignment Act of 1877 in *Farwell v. Cohen*, 138 Ill. 216, it would seem that the case is within the act.

The judgment will be affirmed.

McAtee et al. v. Perrine.

1. *Agency—Special Agent.*—An agent whose authority is confined to a single transaction is commonly denominated a special agent. The principal of such an agent is bound, only so far as his acts are strictly in accordance with the authority given him, and parties assuming to deal with his principal, through him, must, at their peril, ascertain the extent of his authority, and in controversies regarding it, be prepared to establish it by a preponderance of the evidence.

Memorandum.—Action on contract. Appeal from a judgment rendered by the Circuit Court of Macoupin County; the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed December 2, 1892.

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APPELLANTS' STATEMENT OF THE CASE.

The plaintiffs live in Sangamon County; the defendant in Macoupin County. Both parties deal in stock. A Mr. Dragoo, who lived in plaintiffs' neighborhood, was at Girard (defendant's home), on a visit. He and defendant were acquainted. The defendant authorized Dragoo, in November, to contract for from one to three car loads of hogs for him, to be taken between January 10th and January 25th. Dragoo bought one car load of hogs for defendant from the plaintiffs, plaintiffs having first learned from him that he was buying for Perrine, the hogs to be taken at any time from January 10th to February 10th. Defendant refused to take the hogs, though notified that they were waiting for him, and on the morning of January 11th, plaintiffs, in the presence of Dragoo, after previous notice to him, weighed the hogs, loaded them on a car and shipped them to Chicago, where they were sold at the market price, at a loss below the contract price of over a hundred dollars. This suit was brought to recover that amount.

APPELLANTS' BRIEF.

We submit that defendant's silence after being informed of the act of his agent, under the circumstances amounts to a complete ratification of the acts of the agent. The principle is elementary. *Johnston v. Berry*, 3 Brad. 256; *Meister v. Cleveland Dryer Co.*, 11 Brad. 227; *McGeoch v. Hooker*, 9 Brad. 649.

"A principal who is informed of an unauthorized act done by his agent, must give notice of his dissent within a reasonable time or his assent and ratification will be presumed." *Wait's Actions and Defenses*, 234; *Williams v. Merritt*, 23 Ill. 623; *Kent's Commentaries*, 616.

To speak of agency as a special agency, and to make that the test by which to determine the scope of the agency, is erroneous. "We should not confound the extent of the agent's authority, whether limited or unlimited, with the nature of the agency, whether general or special. * * *

The policy and reason of the rule is for the protection of the innocent who deal upon the faith of such authority as the principal holds out or permits as being authorized or sanctioned by him. * * * And it is upon this principle that the principal may frequently be bound to third persons for acts of the agent in violation of his express private instructions, although the agent would be liable to the principal for the breach." Doan v. Duncan, 17 Ill. 272; Noble v. Nugent, 89 Ill. 522, and authorities cited; Story on Agency, Sec. 127; Parsons on Contracts, 41, note b.

ANDERSON & BELL, and E. C. KNORR, attorneys for appellants.

APPELLEE'S BRIEF.

It is elementary law that "persons dealing with an assumed agent, whether the assumed agency be a general or a special one, are bound, at their peril, to ascertain, not only the fact of agency, but the extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it." Mechem on Agency, Sec. 276 and 289; Davidson v. Porter, 57 Ill. 300; Baxter v. Lamont, 60 Ill. 237; Schilling v. Rosenheim, 30 Ill. App. 81; Reynolds v. Ferree, 86 Ill. 570.

While presumptions of greater authority attend a general agent, and possibly estoppel applies strongly in favor of one dealing with a "general agent," still the burden of proof is the same. But the scope of the authority of a special agent is ordinarily much more restricted than that of a general agent; one is in its nature limited and implies limitations of power. Of these limitations, third persons must inform themselves." Mechem on Agency, Sec. 285.

In section 288 of Mechem on Agency, the author announces the rule embodied in this instruction as follows: "The authority of the special agent being in its nature limited, its scope is much more easy of determination, and must not be exceeded, or, as the rule is ordinarily stated, his authority must be "strictly" pursued, and if it is not the principal will not be bound."

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BALFOUR COWEN, U. G. BUTCHER and THOMAS RINAKEE,
attorneys for appellee.

OPINION BY THE COURT.

This action was brought by the appellants to recover damages occasioned by the refusal of the appellee to accept from the appellants, and pay for a certain car load of hogs, which they insist the appellee, through one Dragoo as his agent, contracted for and purchased of them. Having been defeated in the Circuit Court, the appellants prosecute this appeal.

The appellee's grounds of defense were that Dragoo had not general, but only special and limited power to act for or bind him, and that the alleged contract was not within the scope of such authority; that he repudiated it promptly after being advised of it; and that the hogs which appellants contracted to sell to Dragoo would not, either in point of numbers, or quality, meet the requirements of the contract according to its terms and conditions as relied upon by the appellee.

We have carefully examined the testimony. It is directly and sharply conflicting in respect of these defenses, and its value and weight depend largely upon the credit that is or ought to be given to the different witnesses who appeared and testified in the presence of the jury. The judgment, therefore, ought not to be disturbed upon the ground that it is manifestly against the weight of the evidence, though it be true that upon some, if not all, of the material questions, the appellants had preponderance in point of the number of witnesses. The jury seem to have given credence to testimony of the appellee and his witnesses, and we can not say that in this they were wrong. In such cases the instructions should, however, be accurate. The appellants complain of two instructions given for the appellee, and of the refusal of the court to give one asked in their behalf.

In order that these instructions and the criticisms upon them may be understood, it is necessary to state that the

appellee testified that he authorized Dragoo to contract for a car load of hogs, to be delivered and weighed at Glenarm, a station on the Jacksonville Southeastern R. R., at such time as he (the appellee) might desire, from January 10th to January 20th. The appellants sought to recover upon a contract with Dragoo for a car load of hogs, to be delivered at Glenarm at such time from January 10th to February 10th, as appellee might prefer, the hogs to be weighed at a farm some four miles from Glenarm. Dragoo and another witness, one Knotts, testified that though appellee did, when empowering him to buy hogs, first insist that the hogs must be weighed at the railroad station, yet that he finally consented that if the owners of the hogs would not agree to so weigh them, that Dragoo should contract for them to be weighed at the scales nearest where the hogs were kept.

The jury seem to have accepted the version of the appellee, and their power and right to do so can not be denied.

The appellants contended that the requirement that the hogs be weighed at the place of shipment, related merely to the manner of transacting the business with which the agent was charged, and did not touch or limit the authority of the agent or the scope of his power as an agent.

And as to the extension of time given the appellee in which to demand and have the hogs, the view of the appellants is that the appellee thereby obtained only greater privileges and yet retained every right that a strict compliance by the agent with his instructions would have secured to him.

The appellants tendered the hogs on the 11th day of February, and their right of recovery and proof of the amount of the damages seems to rest entirely upon the assumption that the breach of the contract then occurred, and that the measure of damages was dependent upon the market price of hogs on that date. In this view it is apparent that the extension of time for the delivery was a departure from the authority given the agent.

It appears that the hogs driven four miles were thereby reduced in weight. This loss of weight, under the operation

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of the contract sought to be enforced, would fall upon the appellee, while under a contract made as he directed as to the place of weighing, the loss would have fallen upon the appellants.

The place for weighing the hogs was therefore one of the essential provisions of the contract, and the instructions to Dragoo relating thereto constituted the limit and scope of his power and authority in that respect. It is not claimed that Dragoo had authority to act generally for the appellee or that he had ever before acted or assumed to act for him, or that he had been "held out to the world" as invested with power to represent or in any way bind the appellee. His authority was confined to the particular transaction involved in this suit. He was what is commonly denominated a special agent. His principal was bound only so far as his acts were strictly in accordance with the authority given him (1 Amer. & Eng. Ency. of Law, page 351 and note 1, page 352; Mechem on Agency, Sec. 288; Baxter v. Lamont, 60 Ill. 237) and parties assuming to deal with his principal through him must at their peril ascertain the extent of his authority (1 Amer. & Eng. Ency. of Law, page 352; Mechem on Agency, Sec. 289; Davidson v. Porter, 37 Ill. 300) and be prepared to establish it by a preponderance of proof. Mechem on Agency, 276. The court at the instance of the appellee instructed the jury that "if the directions of the principal to his agent are specific to do some particular thing in a particular manner, and the agent disregards such specific instructions and goes beyond his instructions, doing something else in violation thereof, then under such circumstances, the principal is not bound by any contract so made," * * * and if Dragoo was a special agent acting under specific instructions, and violated such instructions, the verdict should be for the appellee, unless such acts of Dragoo were ratified, etc. Without intending to be understood as approving this instruction abstractly, we hold it correct when applied to the facts of this case. It fails to recognize the distinction which is to be drawn between authority given to an agent and instructions or directions as to the manner of executing the authority.

But as the "instructions or directions" in controversy, limited the authority of the agent, the rule announced by the court to the jury is, we think, the one properly applicable to the facts the jury were called upon to consider.

This being true, the instruction asked by the appellants that the appellee could not repudiate "a contract * * * because of the agent's failure to observe unimportant details in the principal's instructions to him, but would be bound by such conduct of the agent, so long as the same is in substance within the reasonable scope of his authority," ought to have been, as it was, refused.

It conveys an assumption that the place where the hogs were to be weighed, and time within which the contract should be terminated, were unimportant details, and it was calculated to lead the jury to understand that something less than a strict compliance with the authority given the agent would bind the principal.

We see nothing else in the case to which it could have applied. It ought not have been given. We believe the appellants were, in the judgment of the jury, beaten upon the facts. No reason is perceived why we should hold that in this they were manifestly wrong. The judgment must be affirmed.

Lloyd et al. v. Kelly.

1. *Testimony in Anticipation of a Defense.*—It is not reversible error to permit a plaintiff to testify to matters in anticipation of a defense, especially so, where, after the defense is developed, the evidence becomes proper.

2. *Intoxicating Liquors—Notice.*—A person bringing an action for the recovery of damages under the statute relating to the sale of intoxicating liquors, is not bound to require the marshal to notify saloon-keepers not to sell liquors, etc., as a condition of recovery. The mere fact that by the ordinances the marshal was required to post the names of those persons whose wives would so notify him, imposes no legal duty in this respect, upon a plaintiff.

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3. *Assignment of Error.*—An appellant can not assign for error, a matter affecting another, who was co-defendant in the court below, and as to whom the suit was dismissed and who did not appeal.

4. *Special Interrogatory—Refusal to Submit.*—It is not error to refuse to submit a special interrogatory which does not call for an ultimate fact, upon which the rights of the parties are dependent, such as call for probative facts, which may more or less tend to settle the ultimate facts, that is, for statements of the evidence; interrogatories of this character are not such as the statute contemplates.

5. *Answer to Special Interrogatories.—Waiver.*—When a more definite answer than the one given by the jury to a special interrogatory is desired, a motion to send the jury back to their room for that purpose is proper. The matter is waived by taking no objection to the answer.

6. *Instructions—Intoxicating Liquors.*—An instruction announcing in substance that if the defendants sold liquor to the husband, which caused his intoxication in whole or in part, and that thereby the plaintiff was injured in her means of support, she had a cause of action, is proper.

7. *Ibidem.*—An instruction to the effect that if the husband had become a drunkard, and from that cause ceased to support his wife, she could not complain if she kept him in the same condition and prevented him from resuming his normal condition and thereby prolonged the loss entailed upon her by bad habits, which their acts assisted to maintain and strengthen, is properly refused, for the reason that the defendant would, in a legal aspect, be just as responsible for continuing the loss as for causing it in the first place, though the damages might not be the same in both cases.

8. *Intoxicating Liquors—Injuries Caused by the Sale of.*—A wife is entitled to support from her husband, and may complain whenever his capacity or inclination to support her is substantially impaired or diminished. Although a husband may have previously contracted the habit which so deprived her of her legal due, yet if the supply of liquor were discontinued, he would presumably be restored to his normal condition and capacity, at least to some appreciable extent, and whatever prevented such restoration, would amount to a loss of support.

Memorandum.—Action for damages resulting from the sale of intoxicating liquors. Appeal from a judgment in favor of the plaintiff for \$500, rendered by the Circuit Court of Montgomery County; the Hon. JAMES A. CREIGHTON, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed December 2, 1892.

APPELLEE'S STATEMENT OF THE CASE.

Appellee brings her action under the Dramshop Act, to recover for injuries to her person, property and means of support, by reason of the sale of intoxicating liquors to her husband.

Appellee was married to Kelly about twenty years ago, and they have five living minor children. He ran a second-hand store. It was a profitable business, and he supported his family until the last three years, when he began to drink and neglect his business. He was a regular customer at appellants' saloons, and was drunk quite frequently. While intoxicated he would come home and abuse his wife and children, and destroy the furniture. In August, 1890, appellee was the owner of \$100 worth of goods in the store and \$30 worth in the dwelling-house, and this property was sold by Kelly, a piece at a time, and the money spent in appellants' saloons. Appellants let Kelly have whisky at all times.

APPELLANTS' BRIEF.

A wife can not be an active and willing agent with the saloon-keepers, assisting in making her husband a common drunkard, and then expect the defendants to pay her for any loss she has sustained. The appellants had a right to know of the jury, by special interrogatories, to what extent she contributed to her own misfortune. *Hays v. Waite*, 36 Ill. App. 397; *Reget v. Bell*, 77 Ill. 593; *Rosecranz v. Schumaker*, 26 N. W. Rep. 784 (Michigan); *Engleken v. Hilger*, 43 Iowa, 563; *Reget v. Bell*, 77 Ill. 593.

This was not a case which justified the jury in awarding exemplary damages. Such damages are only properly given in cases where aggravating circumstances are shown, and are not awarded as punishment, or as compensation, over and above actual damages sustained, but operate as an example or warning to deter the party or others from similar transactions. *Kadgin v. Miller*, 13 Brad. 474; *Meidil v. Anthis*, 76 Ill. 241; *Kellerman v. Arnold*, 71 Ill. 634; *Holmes v. Nooe*, 15 Brad. 164; *Murphy v. Carran*, 24 Ill. App. 475.

AMOS MILLER and LANE & COOPER, for appellants.

APPELLEE'S BRIEF.

The presiding judge has the right in all cases to control the form of the special verdict, * * * and the tendency

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of some of the profession * * * to abuse it (statute relating to special findings) by demanding that the jury shall answer an infinite number of questions, the object of which is to confuse, embarrass and confound the jury, instead of eliciting facts upon which the rights of the parties depend, needs the restraining hand of the judges * * * and this court will sustain such judges in every proper effort to make a special verdict a concise statement of the real facts at issue in the case. *Ward v. Busack*, 46 Wis. 407; *T., St. L. & K. C. Ry. v. Kid*, 29 Ill. App. 353; *C. & N. W. Ry. Co. v. Dunleavy*, 27 Ill. App. 440; *C. & N. W. Ry. Co. v. Bouck*, 33 Ill. App. 127; 2 *Thompson on Trials*, Sec. 2681; *Fortune v. Jones*, 30 Ill. App. 120.

CREIGHTON GARDNER and G. L. ZINK, attorneys for appellee.

OPINION BY THE COURT.

Appellee recovered a judgment against appellants in the sum of five hundred dollars for damages sustained to her means of support by reason of the intoxication of her husband, caused in whole or in part by liquors sold to him by the appellants, as was alleged.

It is assigned as error that the court refused the challenge of appellants to jurors Downs and Davis. Appellants' abstract fails to set out the answers of these jurors, but in the abstract furnished by the appellee, the answers are given, and they disclose no ground for peremptory challenge.

It is urged that the court erred in allowing appellee to testify what was her habit in respect to drinking.

This statement of hers was unnecessary, at the time it was made, but it was probably in anticipation of a branch of the defense that the habits of her husband were induced by her own in that respect. It was certainly proper for her to state the fact after this defense was developed, and that the statement was made in advance, did no harm.

Equally untenable is the objection that the court per-

mitted her to testify that her husband wished to bring liquor to the house, and drink it there, and that she objected, for it tended to show that she was not disposed to encourage him in the use of liquor, and thus meet a point in the defense which has been persistently insisted upon all through the case.

It is urged the court erred in refusing to permit proof that appellee had not required the town marshal to notify the saloon men not to sell to her husband.

She was not bound to give such notice as a condition of recovery, and since there was no proof of such notice it was presumable no notice was given.

The mere fact that by the ordinances, the marshal was required to post the names of those persons whose wives would so notify him, did not impose any legal duty in this respect upon the appellee, and if any inference of want of good faith could be drawn from an omission to give such notice it could as well be drawn from the omission on her part to prove that she did give it. We regard it as unimportant.

It is also urged the court refused to allow the witness Morrison to state what the husband told him when he handed him an order, given by appellee, allowing the said Morrison to furnish liquor to her husband.

The defendant Morrison was dismissed from the case, and, of course, has not appealed. He only could have complained of the ruling on this point, not the remaining defendants, to whom the order was not applicable, but we think there was no error in this respect.

The husband's declaration was not binding upon her under the circumstances, and was properly excluded.

It is urged further that the court refused to submit certain special interrogatories to the jury, and modified another.

The refused interrogatories called for answers which would not have been decisive of any question of fact, but at most would have been evidentiary only in their effect.

The interrogatories did not call for ultimate facts upon

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which the rights of the parties were dependent, but rather for probative facts which might more or less tend to settle the ultimate facts. In short, they called for statements of the evidence. They were not such interrogatories as the statute contemplates, and were properly refused. *Chicago & N. W. R. R. Co. v. Dunleavy*, 129 Ill. 132; *T. H. & I. R. R. Co. v. Voelker*, *Ib.* 540.

The modification of the fifth was proper, for thereby the jury were required to answer whether the supposed permission to sell was a voluntary act on the part of the plaintiff. The objection that the court did not require the jury to state under which count of the declaration they found for plaintiff, if at all, is fully met by the fact that by the first interrogatory the jury was required to answer whether the plaintiff was injured in her person, and by the second, whether she was injured in her property, or means of support, or either.

The second was answered affirmatively, though without specifying whether the injury was to the property or means of support, or both, but no objection was taken to the answer thus made. Had a more definite answer been deemed important, it might have been obtained by sending the jury back to their room for that purpose. This objection must be overruled.

It is assigned as error that the court improperly instructed the jury for the plaintiff. The first instruction so given announced in substance that if the defendants sold liquor to the husband, which caused his intoxication, in whole or in part, and that thereby the plaintiff was injured in her means of support, she had a cause of action, and it was properly given.

The second was as to the effect of certain alleged acts of the plaintiff in going with her husband to places where liquors were dispensed, and drinking in his presence, advising the jury that such acts, if proved, would not bar the action, and were to be considered only in mitigation of damages, which, as we understand, is the rule of law as laid down in *Hackett v. Smelsley*, 77 Ill. 119.

The third properly advised the jury that no order, per-

mit or consent given by the plaintiff, that liquor might be sold her husband, would bar the action as to such sales, unless voluntarily given.

There was evidence tending to show that the order given to defendant Morrison, who was dismissed from the case on the trial, and the alleged acts of plaintiff in giving encouragement to her husband's disposition to drink, were involuntary, and were induced by the coercive conduct of the husband under circumstances that rendered her incapable of successful resistance. This instruction was properly given.

The court refused certain instructions asked by defendants and error is assigned in regard thereto.

The first of these was to the effect that if the plaintiff encouraged and permitted her husband to drink liquors at her home, and at saloons and other places, whereby he became intoxicated, and the damages complained of were the result of such intoxication, the jury should find for defendants. The second was intended to cover the same proposition in different terms, and the third, in still different phrase, was intended for the same purpose. Without attempting to determine whether the acts herein referred to could be properly regarded in bar, or only in mitigation under the rule as laid down in *Hackett v. Smelsley, supra*, and without discussing the evidence to ascertain how much there was in it to predicate these instructions upon, we feel clear that all there is in them which the defendants could properly insist upon, is contained in the third and fifth, which were given and which were sufficiently favorable and liberal. No error prejudicial to appellants can therefore be found in this action of the court.

The fourth refused seems to have but little support in the evidence. The point thereof was, by way of argument rather than of direct statement, that if the husband had ceased to support the wife, she lost nothing by the defendants' act in selling him the liquor which continued him in his evil course.

In other words, if he had become a drunkard and from that cause ceased to support her, she could not complain if the defendants kept him in the same condition, and prevented him from resuming his normal condition, and thereby pro-

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longed the loss entailed upon her by bad habits which their act assisted to maintain and strengthen. We are constrained to disagree with this position, and to hold that the defendants would, in a legal aspect, be just as responsible for continuing the loss as for causing it in the first place, though the damages might not be the same in both cases.

The wife is entitled to support from her husband, and may complain whenever his capacity or inclination to support her is substantially impaired or diminished. Although he may have previously contracted the habit which so deprived her of her legal due, yet if the supply of liquor were discontinued he would presumably be restored to his normal condition and capacity, at least to some appreciable extent, and whatever prevented such restoration would amount to a loss of support. The view suggested by the instruction is narrow and unreasonable, as we think, and was properly disregarded by the trial court.

The sixth refused referred only to the alleged order given to the defendant Morrison, and the matter therein set up could not be availed of by the other defendants. As the case was dismissed as to Morrison, the court very properly refused the instruction. It had no place in the case and could have served only to mislead the jury.

The fifth instruction was properly modified by the substitution of the word voluntarily, as qualifying the supposed authority to sell.

On the merits of the case there seems to be no good reason for interfering with the judgment.

Applying the strict rule of liability imposed by our statute to the testimony, it is quite apparent the jury had ample warrant for the conclusion reached. The amount allowed is clearly within the proof, and there is no occasion to suppose the jury were actuated by passion or prejudice.

The plaintiff suffered grievously by reason of her husband's inebriation. If the defendants contributed thereto they can not complain, under the law as it is written in the Dramshop Act, that the damages assessed are too high. The judgment must be affirmed.

Peoria, Decatur & Evansville Ry. Co. v. Hardwick.

1. *Master and Servant--Railroad Employes.*—It is a familiar doctrine in this State that an employe must be careful to note and report any defects or want of repair in the appliances which he is required to use. If the employer uses reasonable care to furnish safe and suitable appliances, he may expect his employe will promptly call attention to any defects that may appear, or of any repairs that may become necessary, so far as due care on his part will discover the same, and an employe who fails in this respect does not exercise ordinary care for his own safety.

2. *Master and Servant.*—The mere relation of master and servant can never imply an obligation on the part of the master to take more care of a servant than he may reasonably be presumed to take of himself, and so where defects in machinery or other appliances are as well known to the servant as to the master, the servant must be regarded as voluntarily incurring the risk resulting from its use, unless the master, by urging on the servant, or coercing him into danger, or in some other way, directly contributes to the injury.

3. *Master and Servant—Relative Duties—Instructions.*—It is error to instruct the jury that the master's duty is absolute, that he must furnish reasonably safe machinery and keep the tracks in reasonable repair, making him the insurer to that extent, when it is well settled that he is bound only to use due and reasonable care to that end.

4. *Instructions—Evidence Conflicting.*—In cases where the proof is of an unsatisfactory character, great accuracy and harmony should mark the instructions.

Memorandum.—Action against an employer by an employe for personal injuries. Appeal from a judgment in favor of plaintiff, rendered by the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed December 12, 1892.

APPELLANT'S BRIEF.

Plaintiff was bound to prove, among other things, each of the following points and failed to do so:

That the plaintiff was negligent as alleged. *St. L. Bridge Co. v. Fellows*, 31 Ill. App. 282; *Sack v. Dolese* (Ill.), 27 N. E. Rep. 62; *C., B. & Q. R. R. v. Montgomery*, 15 Brad. 205; *C., B. & Q. R. R. v. Smith*, 18 Brad. 119; *St. L. A. & T. Ry. Co. v. Lemon* (Tex.), 18 S. W. Rep. 331; *B. & P. R. R. Co. v. Maryland*, 23 Atl. Rep. 310.

48	562
53	161
48	562
56	458
48	562
95	1630
95	1681
50	562
115	257

That the defendant had knowledge of the alleged defect, or was negligent in not knowing it. C., B. & Q. R. R. v. Montgomery, 15 Brad. 205; Richardson v. Cooper, 88 Ill. 270; E. St. L. P. & P. Co. v. Hightower, 92 Ill. 139; C., R. I. & P. R. R. v. Clark, 108 Ill. 113.

That the injury was caused by the alleged defects and in the manner charged in the respective counts of the declaration. Bloomington v. Goodrich, 88 Ill. 558; Gavin v. Chicago, 97 Ill. 66; L. S. & M. S. R. R. v. Beam, 11 Brad. 215; Chicago v. Dignan, 14 Brad. 128; Joliet v. Henry, 11 Brad. 154.

Plaintiff can not recover on account of the construction of the footboard, because he must have known its condition and height from the ground. It was there for his special use. I. C. R. R. v. Jewell, 46 Ill. 99; T. W. & W. Ry. v. Eddy, 72 Ill. 138; C. & A. R. R. v. Bragonier, 119 Ill. 51; T. W. & W. Ry. v. Asbery, 84 Ill. 429; Appel v. B. N. Y. & P. R. R. Co., 111 N. Y. 550; Lothrop v. Fitchburg R. R., 150 Mass. 423; Brooks v. North Pacific R. R. Co., 47 Fed. 687; C., R. I. & P. R. R. v. Clark, 108 Ill. 113.

It is not the law that defendant was bound to furnish reasonably safe appliances and to keep its tracks in reasonable repair. It is only required to use reasonable diligence to that end. City of Hoopeston v. Eads, 32 Brad. 75; C., B. & Q. R. R. v. Merckes, 36 Brad. 196, 204; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; C., R. I. & P. v. Lonergan, 118 Ill. 41; T. W. & W. Ry. v. Eddy, 72 Ill. 138; W., St. L. & P. Ry. v. Fenton, 12 Brad. 417; C., M. & St. P. Ry. v. Standart, 16 Brad. 145.

It was error to instruct in this case that the law does not presume, in the absence of proof, that the plaintiff had notice, etc. The foot-board was there for his benefit. The law presumes he knew all defects open to ordinary observation, *e. g.*, the height of foot-board. I. C. R. R. v. Jewell, 46 Ill. 99; T. W. & W. Ry. v. Eddy, 72 Ill. 138; C. & A. R. R. v. Bragonier, 119 Ill. 51; C., R. I. & P. Ry. v. Clark, 108 Ill. 113; C., B. & Q. v. Montgomery, 15 Brad. 205; Lothrop v. Fitchburg R. R., 150 Mass. 423; Consolidated Coal Co. v.

Wombacher, 134 Ill. 57, 66; M. C. R. R. v. Austin, 40 Mich. 247.

The instruction should have stated that plaintiff could not recover if he knew, or "in the exercise of reasonable observation should have known, of the defect." It required a higher duty of defendant than of plaintiff. C., B. & Q. R. R. v. Warner, 108 Ill. 538; St. L. & S. E. Ry. v. Britz, 72 Ill. 256; C., R. I. & P. v. Clark, 108 Ill. 113; C. & A. R. R. v. Bragonier, 119 Ill. 51, 66; McCormick Machine Co. v. Burandt, 136 Ill. 170; Quick v. Minnesota Iron Co. (Minn.), 50 N. W. Rep. 244; Pederson v. City of Rockford (Minn.), 42 N. W. Rep. 1063; Brooks v. North Pacific R. R. Co., 47 Fed. Rep. 687.

Plaintiff's fourth instruction had no application to the issues or evidence. It was erroneous and misleading. Defendant was not charged with a violation of the duty described. C., R. I. & P. v. Lonergan, 118 Ill. 41; McNair v. Platt, 46 Ill. 211; Espen v. Roberts, 33 Ill. App. 268.

STEVENS & HORTON and WILEY & NEAL, attorneys for appellant.

APPELLEE'S BRIEF.

Railroads are held to the highest degree of vigilance to keep their road and all portions of their track in such repair and so watched and tended as to insure the safety of all who may be lawfully upon them, whether passengers, servants, or others. Railroad v. Shannon, 43 Ill. 345; Railroad v. Troesch, 68 Ill. 546; Railroad v. Swett, 45 Ill. 203.

The servant is entitled to assume that his master has furnished him with suitable and safe track and surroundings, and relieve him of investigation and inquiry in that regard. Railroad v. Hines, 132 Ill. 165; Railroad v. Swett, 45 Ill. 201; Railroad v. Welch, 52 Ill. 186; Nadua v. White, etc., 76 Wis. 131.

It is not his duty to ascertain whether the machinery and structure of the road are defective. It is the duty of the company to keep them in a safe condition. Railroad v.

Hines, 132 Ill. 165; Porter v. Railroad, 60 Mo. 160; 2 Thompson on Negligence, 1012.

Negligence of the plaintiff will not be presumed; it is a matter of defense. Railroad Co. v. Hines, 132 Ill. 165; Railroad Co. v. Clark, 108 Ill. 117.

When the nature of the service is such as to require that exclusive attention be fixed upon it, that they should act with rapidity, it can not be expected the servant should always bear in mind the existence of defects. Thompson on Negligence, Sec. 93; Railroad Co. v. Gregory, 58 Ill. 272; Railroad Co. v. Swett, 45 Ill. 201.

CRAIG & CRAIG, attorneys for appellee.

OPINION BY THE COURT.

Appellee recovered a judgment against appellant for \$13,200. The declaration contained five counts, the first of which averred that the plaintiff was in the employ of the defendant as a switchman, and that while he was standing on the foot-board of a moving switch engine, in the performance of his duty, the foot board came in contact with the end of a plank (which was laid alongside the track) constituting a part of the crossing of B street, over the track, whereby he was thrown under the engine and seriously injured. In the second count it was averred that the rods supporting the foot-board had become out of repair and unfit for use, whereby the foot-board gave way, etc., etc.

The third count charged that the plank had become loose and extended above the track, so as to come in contact with the foot-board. The fourth count charged that the foot-board was hung so low that it would not safely pass over the tracks; and the fifth, that the plank had become loose and elevated, so as to be in the way of the foot-board.

Negligence of defendant was averred as to each of these matters, and it was averred that the plaintiff was not aware of the alleged defective conditions, and that he used ordinary care.

Thus, the plaintiff's allegations of negligence on the part of defendant were in substance :

1. That the foot-board was out of repair, in that the rods supporting it had become unsound and unfit for use.

2. That the foot-board was improperly constructed, in that it was hung too low.

3. That the plank, which was a part of the crossing, had been permitted to become loose, and raise up so far above the track as to obstruct the foot-board.

As to the first, there seems to have been no proof, nor anything tending to support it, aside from the fact that the foot-board was broken. The mere fact that a piece of machinery gives way, is not of itself sufficient to support the charge of negligence in an action by an employe against the employer. The allegation of negligence must be proved, and proof of the accident and injury does not shift the burden upon the employer so as to require him to show that he was free from negligence. *Sack v. Dolese*, 137 Ill. 129.

As to the other two grounds of alleged negligence, there was some proof *pro et con*. We shall not attempt to state it, but in our opinion it is difficult to see how the jury could find that the preponderance was with the plaintiff upon the second. As to the third, the evidence was very conflicting. Some of the witnesses for the plaintiff, say the plank was two and a half inches above the track, others an inch and a half, and so on, while the witnesses for defendant, who profess to have measured accurately, say not more than a half inch.

If the foot-board was adjusted at the proper height above the track, as the evidence seems to show, it is not readily apparent how the accident is to be accounted for. It may be that the engine, in moving rapidly, would dip more or less at each end, and that a loose joint in the track would increase this tendency. But whatever the cause, it was incumbent upon the plaintiff to show that he was unaware of any defective conditions, and that the defendant knew, or by the use of due care would have known, that there was a defect either in the construction of the engine or in the condition of the track.

The plaintiff had been engaged in this service for a considerable time, riding many times a day on this foot-board, over the very place where this accident occurred. He not only made no complaint of any defective condition as to either, but in his testimony he omits to say that he had ever discovered anything wrong or dangerous. He might be excused, ordinarily, for not observing the supposed protrusion of the plank above the track, if he had not so frequently ridden on the foot-board; but waiving this as an independent item, we can not understand how he should have failed to notice the fact, if it was a fact, that the foot-board was hung too low for safety, and then the observation that led to this conclusion could hardly have failed to disclose, if it was true, that the plank had become too high.

These considerations are important, because of the duty of the plaintiff to use due care, and to report any dangerous condition he may discover, to his employer.

In *C., R. I. & P. Ry. Co. v. Clark*, 108 Ill. 119, the Supreme Court, in commenting upon a somewhat similar situation, remarks as follows:

“If deceased could not learn the place was dangerous by reasonable care, how can appellant be held liable because it did not learn the fact? Reasonable care, when exercised by the company, could only reach the same results that would be attained by the use of the same care by deceased. If by his care and diligence he could not learn that it was dangerous, it is unreasonable to hold appellant liable, where, by the use of the same care, it could not learn there was any danger.”

It is familiar doctrine in this State, that an employe must be careful to note and report any defects or want of repair in the appliances he is required to use. If the employer uses reasonable care to furnish safe and suitable appliances he may expect the employe will promptly call attention to any defects that may appear or any repairs that may become necessary, so far as due care on his part will discover the same, and an employe who fails in this does not exercise ordinary care for his own safety. *I. C. R. Co. v. Jewell*, 46

Ill. 99; T. W. & W. Ry. Co. v. Eddy, 72 Ill. 138; Penn. Co. v. Lynch, 90 Ill. 333; C. & A. R. R. Co. v. Bragdonier, 119 Ill. 51. Many other cases might be cited.

As was said in *Priestly v. Fowler*, 3 M. & W. 1, quoted in *Penn. Co. v. Lynch*, *supra*: "The mere relation of master and servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be presumed to take of himself;" and continuing, the court said, "and so it is held that where defects in the machinery or other appliances are as well known to the servant as to the master, the servant must be regarded as voluntarily incurring the risk resulting from its use, unless the master, by urging on his servant or coercing him into danger, or in some other way, directly contributes to the injury."

The third instruction given for the plaintiff reads thus:

"The court instructs the jury that if they believe from the evidence that the plaintiff was in the employ of the defendant as a switchman, in the switch-yards of the defendant, that in that case it was the duty of the defendant to furnish reasonably safe machinery and appliances and to keep the track in reasonable repair, and the plaintiff had a right to rely upon the defendant to do so, and the plaintiff was not bound to test the safety and fitness of the machinery in the first instance, before using it, in the absence of notice or knowledge, in the exercise of due care, that there was something wrong in that respect, and that the law does not presume, in the absence of proof, that the plaintiff had notice of defects, if the jury believe from the evidence that any existed, but the burden is on the defendant to prove that the plaintiff had notice of the defects, provided he has shown in the first instance, he was in the exercise of ordinary care at the time he was injured; and if the jury believe from the evidence that plaintiff received injuries from the defects of the foot-board, as alleged in the declaration, or received injuries from defects in the crossing at "B" street, by boards protruding, as alleged in the declaration, if from the evidence any such defects existed, while riding on the

P., D. & E. Ry. Co. v. Hardwick.

foot-board in the regular and usual course of his employment, and exercising due care, if the jury so believe from the evidence, and that such defects were unknown to him, and that if the jury further believe from the evidence that the defendant knew of such defects, if any existed and are proven by the evidence, and that the existence of such defects constituted negligence on the part of the defendant, and in the exercise of ordinary care and diligence the defendant could have known of and repaired them, then the defendant is liable therefor."

By this the jury were told that the master's duty is absolute, that he must furnish reasonably safe machinery, etc., and keep the tracks in reasonable repair. Thus he is made an insurer to that extent. But it is well settled that he is bound only to use due and reasonable care to that end. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *C., R. I. & P. Ry. Co. v. Lonergan*, 118 Ill. 41.

And this rule has been frequently announced by the Appellate Courts. The difference between the duty to furnish reasonably safe machinery and appliances, and the duty to use reasonable care to furnish such, is too apparent for discussion, and while in judicial opinions the distinction may not always have been kept in view, yet, it is believed, that it has nowhere been intended to hold that the master is under an absolute duty in this respect. This instruction was also faulty in releasing the plaintiff from all duty to take notice of any defects which the use of the engine might have disclosed as to its construction.

As applied to the evidence the jury were permitted to find for the plaintiff, if they believed the machinery was not reasonably safe, or that the track was not so, regardless of the efforts of the defendant to make them so in the first place, and regardless of the failure of the plaintiff to discover anything insufficient in construction or in repair, and in express terms relieving the latter from all duty to notice and report any deficiency that by due care he might have discovered. It is true the phrase "exercise of due care" as applied to the plaintiff appears more than once in the

instruction, but it is in such a connection and so obscured by the other terms used as to be without practical effect.

To say the least, the instruction is confusing and misleading, so that the jury might easily mistake the law to be applied to the evidence upon this very important point in the case.

The latter clause assumes that in the exercise of due care the plaintiff might fail to discover defects in the foot-board or in the crossing, and yet, that in the exercise of no higher degree of care the defendant was expected to make the discovery, a suggestion condemned as unreasonable by the Supreme Court in *C., R. I. & P. Ry. v. Clark*, *supra*. In view of the inconclusive nature of the evidence, and of the very high figure at which the damages were assessed, we not only can not say the jury were probably not influenced unfavorably by this instruction, but, on the contrary, we are strongly impressed with the suggestion that it had much to do in causing the verdict. We can not say its faults were cured by the instructions given for defendant. We regard the case as one where, because of the unsatisfactory character of the proof, great accuracy and harmony should have marked the instructions as a series, and from the amount allowed by the jury, we are disposed to think the case did not receive at their hands the impartial consideration the law requires. The judgment will be reversed and the cause remanded.

Haines v. Amerine.

1. *Limitations--Burden of Proof Under Plea Traversed.*—Under a plea of the statute of limitations, traversed, the burden of proof is upon the defendant.

2. *Instructions—Assuming Facts, etc.*—It is not error for an instruction to assume facts conceded and not controverted.

3. *Judgment Proper on its Face—Costs as to a Dismissed Defendant.*—Where it is assigned for error that the judgment was rendered against a party for costs, made by reason of another party being originally made

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defendant, but as to whom the suit had been dismissed while pending in a justice's court, the abstract not showing what costs, if any, were made in that court, the judgment appearing proper on its face, and nothing appearing *aliunde* to vitiate it, it will not be disturbed.

Memorandum.—Assumpsit. Appeal from a judgment for plaintiff, rendered by the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892, and affirmed. Opinion filed January 8, 1893.

APPELLANT'S BRIEF.

In a justice's court, all proceedings are *ore tenus*, and the statute of limitations is presumed to have been pleaded, if necessary to the defense. *William v. Corbet*, 28 Ill. 252; *Comstock v. Ward*, 22 Ill. 248.

"In trials before justices of the peace, and in the Circuit Court on appeals from their judgments, formal written pleadings are not required, and a defendant has a right to insist upon proof of all material facts necessary to a recovery, precisely as if pleas were filed." *Town of Lewistown v. Proctor*, 27 Ill. 416; *Hennies v. People*, 70 Ill. 100.

Where a cause is dismissed upon motion of the plaintiff, it should be at his cost. *Kinman v. Bennett*, 1 Scam. (Ill.) 326; *Shaffer v. Currier*, 13 Ill. 668; *Holliday v. Shugart*, 56 Ill. 44; *Smith v. Forbes*, 14 Brad. 477.

A finding of a court contrary to the decided weight of evidence is good ground for reversal. *Udell v. Howard*, 28 Ill. App. 124.

The verdict of the jury should always be a just and fair conclusion from the whole evidence. *Smith v. Slocum*, 62 Ill. 360.

GRAY & WAGGONER, attorneys for appellant.

WINTER & SON, with RAY HAMER, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Presiding Judge.*

This action was commenced by appellee before a justice of the peace against appellant and Seaborn Haines, to recover

damages for alleged failure to deliver wheat according to contract. On the trial the case was dismissed by plaintiff as to Seaborn, and judgment rendered for damages found and costs against appellant, who appealed to the Circuit Court, where judgment was again rendered for plaintiff, on verdict for a larger amount.

Appellee was a grain buyer at Vermont, and appellant a farmer in the neighborhood. On July 6, 1891, Seaborn Haines, as agent of his brother, the appellant, sold to appellee by sample from 1,000 to 1,500 bushels of wheat, not then threshed, at eighty cents per bushel. Plaintiff claimed that by the contract the wheat was to be delivered when threshed, and to be threshed in a reasonable time; and that was expected to be within two weeks, as expressed by Haines. The latter claimed that it was to be delivered, if threshed within two weeks. That is the only difference between the parties upon any material question of fact. The wheat was not threshed within two weeks, not through any fault of the defendant, but because the machine he had engaged broke down, and he failed in his efforts to get another within the time. Some two months later, he did thresh and ship it, and at that time it was worth ninety cents.

We do not care to discuss the evidence on the point in difference. It was conflicting, and the question has been twice decided against appellant by triers who saw and heard the witnesses. We think these findings fairly settle it.

In speaking of the occurrences referred to, the witnesses give the day of the month, without the year. Appellant here gravely claims that as all defenses are presumed to be relied on in justices' courts, including the statute of limitations, and as the cause of this action was not shown to have arisen within five years, it was barred by that statute. It does not appear that this supposed point was hinted at in either of the courts below. One of the defendant's witnesses, by his answer to a question not abstracted, clearly fixed the time as in "this year," the year of the trial, and thirdly, under a plea of the statute, traversed, the burden of proof is on the defendant.

It is assigned for error that judgment was rendered against appellant, "for cost made by reason of Seaborn Haines being made a party defendant." Seaborn Haines was not a party to this record, and the judgment was that "plaintiff do have and recover of and from the defendant the sum of one hundred and twenty dollars damages, together with his cost and charges by him about this suit in this behalf expended, to be taxed, and may have execution therefor." Nor does the abstract show what, if any, cost was made in the justice's court that would not have been properly made, if he had not been a party defendant there. The judgment on its face is proper, and nothing appears *aliunde* to vitiate it.

It is said that by the third instruction for plaintiff as to the measure of damages, the court assumed there was a difference between the contract price and the market price at the time of the alleged breach. It is not clear that the instruction did so assume, but if it did it was not error, because the fact so assumed was not controverted. It was conceded that the contract price was eighty cents, and three witnesses, being all who testified on that point, stated that the market price when the wheat was shipped by defendant, was ninety.

The defendant's refused instruction was substantially and fully embraced in the first and third of those given.

Perceiving no material error in the record, the judgment will be affirmed.

Rice & Co. v. Weber.

1. *Construction of Contracts.* --In construing a contract, the situation of the parties at the time it was entered into, the property which is the subject-matter of the contract, and the intention and purposes of the parties in making the contract, will be taken into consideration, and the intention of the parties carried into effect, so far as the words employed by the parties and the rules of law will permit.

2. *Contracts Depending upon Future Growth, etc.*—Where a contract relates to specified things, and the performance of it must, in the contemplation of both parties, depend upon the future growth and continued existence of such things, the destruction of the subject-matter of the contract excuses its performance, if such destruction is from no fault or negligence of the party who is unable to perform it.

Memorandum.—Action for breach of contract. Appeal from a judgment rendered by the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the May term, A. D. 1892. Opinion filed March 6, 1893.

APPELLANT'S STATEMENT OF THE CASE.

On July 22, 1890, W. C. Langbridge, who was traveling for appellant (an incorporated company), solicited, and appellee gave, an order for several kinds of seed potatoes—twenty-five barrels in all, at \$2.75 per barrel, to be delivered the following spring. They were not delivered. Appellee brought suit in attachment. Appellant entered appearance and attachment was dismissed. The justice gave judgment against appellant for \$75. He appealed to the Circuit Court, where judgment was entered against him for \$62.50.

Appellee made a contract with said agent, Langbridge, for the delivery of twenty-five barrels of seed potatoes in the following spring at \$2.75 per barrel, appellee to pay freight estimated at 25c. per bbl., but he never received them. In the following spring he had to buy his potatoes elsewhere at an increased price of three dollars per barrel. Langbridge represented his crop as splendid, in their locality. Their conversation resulted in appellee giving an order in the following language:

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Agents: Do not write in this space.	Ackd	BULK SEED DEPARTMENT.
	B	All orders are taken subject to the approval of the house, and providing stock is unsold upon receipt of order. No arrangement or contract will be recognized unless specified in this order. Prices net. No seeds or bags to be returned; freight to be paid by purchaser. After shipment in good order our responsibility ceases, and no claims for delays, damages, losses or miscarriage will be allowed. Nor charge for packing or carriage. Barrels, bags and boxes are charged at cost. All accounts subject to sight draft if not paid when due. Salesmen are instructed to give purchaser duplicate order when requested.
	D	
	C. R. & S.....	
	Chgd.....	
	Route.....	
	Agent.....	JACKSONVILLE, ILLS., July 22, 1890. JEROME B. RICE & Co., Cambridge, N. Y.:
	Book	Please send in spring as soon as weather permits the following SEEDS in bulk.
	D. P.....	TERMS OF SALE—Net cash on June 1st after date without regard to day of purchase, or a discount of one per cent. a month will be allowed on all payments before June 1st.
	Sec.	
S. No.....	Name HERMAN WEBER, P. O., Jacksonville, Illinois.	
Care of.....		

Brls.	Variety.	Price.			
		\$	c.	\$	c.
5	Potatoes Ery Sunrise,	2	75	13	75
5	“ Rose	2	75	13	75
10	“ Ohio	2	75	27	50
5	“ Beauty Hebron	2	75	13	75
No charge for barrels					
Stock to be first class					
(Signed), HERMAN WEBER					

The counterpart of this was signed by W. C. Langbridge and retained by appellee.

Afterward appellee sent the following letter:

H. WEBER,
DEALER IN
GROCERIES, GLASS, WOODEN AND WILLOW WARE, TOBACCO,
CIGARS, ETC.
68 East Side Square.
JACKSONVILLE, ILL., Aug. 19th, 1890.

JEROME B. RICE & Co.,
Gents—July 22d I ordered through your agent 25 Bbls seed potatoes of four different kinds. Please add 10 more Bbls of Rose, 10 more Bbls. Early Ohio and 5 more Bbls Early Sunrise and oblige,
HERMAN WEBER.

To these communications Mr. Weber had no reply until about Oct. 15th when he received a circular from appellant stating that the potatoes in their vicinity were attacked by rot and so completely destroyed that they were unfit to depend upon for seed, hence "please consider the order you gave our agent canceled." To this he made no answer.

JULIAN P. LIPPINCOTT, attorney for appellant.

APPELLEE'S BRIEF.

We take the ground that when the principal received notice from the agent of his act in selling the potatoes, then the principal, if he did not approve the order, was bound to repudiate it within a reasonable time. That he could not "file it away," and then after three months, and after potatoes had risen in price, refuse to comply with its terms or repudiate the sale. 1 Wait's Actions and Defenses, page 228; Searing et al. v. Butler, 69 Ill. 575; Foster v. Rockwell, 104 Mass. 167.

"If the principal did not choose to affirm the act, it was his duty to give immediate information of his repudiation. He can not, by holding his peace and apparent acquiescence, have the benefit of the contract if it should afterward turn out to be profitable, and retain the right to repudiate it if otherwise. Law v. Cross, 66 U. S. 187.

JOHN A. BELLATTI, counsel for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This is an appeal from a judgment rendered in the Circuit Court against the appellant company in favor of the appellee in the sum of \$62.50, for the breach of an alleged contract to deliver twenty-five barrels of seed potatoes.

The appellant company at the time of the making of the alleged contract was engaged in the business of growing seeds of various kinds and supplying merchants and grocery-men with such seeds in packages, to be sold upon commission, and in selling such seeds in bulk to retail dealers. On the

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22d day of July, 1890, A. C. Langbridge, an agent of the appellant company, called upon the appellee, who is a retail dealer in groceries, wooden ware, seeds, etc., in Jacksonville, Illinois, for the purpose of taking up unsold seed left with him at the beginning of the season for sale upon commission and obtaining settlement for such as had been sold. After such business had been satisfactorily transacted, Langbridge, according to the evidence of the appellee, asked the appellee if he wanted some number one seed potatoes. The appellee replied that he did, as "our crop was a failure," and "we must look elsewhere for seed." Langbridge said their crop was splendid. The appellee thereupon signed an order to the appellant company, directing them to send him "in spring, as soon as weather permits, the following seeds in bulk;" the total of the order being for twenty-five barrels of potatoes of different specified varieties. This order was delivered to Langbridge, as agent of the appellant company. On the 19th of August, 1890, the appellee wrote the appellant the following letter:

"H. WEBER, DEALER,
JACKSONVILLE, ILL., August 19, 1890.

JEROME B. RICE & Co.

Gents: July 22d, I ordered, through your agent, twenty-five barrels seed potatoes of four different kinds. Please add ten more barrels of Rose, ten more barrels Early Ohio, and five more barrels Early Sunrise, and oblige,

HERMAN WEBER."

He heard nothing whatever from the appellant company until October 15, 1890, when he received a printed circular, issued by it, advising him that its potato crop was in a serious condition because of the potato rot, which made its appearance about the middle of September, and since continued, with no indication of stopping; that one-half to three-fourths of the crop was worthless, and the farmers feared that all was diseased, and the vitality of the potatoes so far injured that he should not think of getting any seed from this company; that the potatoes could not be relied upon to grow, and would not be acceptable to customers,

and he had better secure potatoes from some locality where the rot had not affected the crop, and notifying him that he might consider his order to the appellant company for seed potatoes canceled. The appellee testified that when he gave the order to Langbridge he understood the appellant company was raising all different kinds of seeds that were in demand; that Langbridge said they had a big crop of potatoes, but didn't say where, but he supposed it was in their locality, or county. It is conceded that the appellant company did not deliver any potatoes to the appellee. No point is made that the damages are excessive. Counsel devote much of their briefs to an interesting discussion of the contention of the appellant company that no contract was completed, because the evidence fails to show that the order of the appellee was accepted. Waiving this, we think there can be no recovery of damages, even if a contract is proven. It appears from the evidence, without contradiction, that it is not the business of the appellant company to sell potatoes upon the general market to be resold for consumption, but only to dealers in seed, for use as seed potatoes. That it does not buy potatoes, but produces them in its fields and gardens, or in the fields of farmers in the immediate vicinity, who, under its supervision, and out of seeds selected by it, plant and cultivate the crop, and produce potatoes for it. In July, 1890, when the alleged contract was made with the appellee, the appellant company had such a crop green and growing, and which promised to mature and yield first-class potatoes for seeding purposes. We think it clearly appears from the evidence that it was the potatoes thus growing, and thus to be matured, that appellant expected to deliver, and the appellee expected to receive. It was for such potatoes the appellee contracted; potatoes out of this crop, then being cultivated, and to be matured by the appellant company as seedsmen, with especial reference to their qualities for seeding purposes. Under the contract the appellee could not have been forced to accept potatoes bought upon the general market, and as a correlative proposition, he could not demand such a performance by the appellant. The evidence

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shows beyond contention that the growing potatoes, which the parties had in contemplation, and which formed the subject-matter of this contract, was stricken with rot, and destroyed, or so badly affected with the disease as to render them unfit for seed, and that the appellant company for this reason was unable to and failed to supply seed potatoes to its customers the following spring. It became apparent to the appellants in October, 1890, that the growing crop was seriously damaged by the "rot," and it was feared that the potatoes that were not destroyed by the disease would be so affected by it, as to be wholly unfit for seed. Of this the appellee was immediately informed by a printed circular. The appellant's catalogue of seeds for the season of 1891, a copy of which reached the appellee about January 1, 1891, advised its customers and the public that it would not supply seed potatoes, because of the injury to the crop by the rot.

In enforcing and construing contracts, the situation of the parties at the time it was entered into, the property which is the subject-matter of the contract, and the intention and purpose of the parties in making the contract will be taken into consideration, and the intention of the parties carried into effect, so far as the words employed by the parties in the contract and the rules of law will permit. 2 Parsons on Contracts, page 499.

Where a contract relates to specified things, and the performance of it must, in the contemplation of both parties, depend upon the future growth and continued existence of such things, the destruction of the subject-matter of the contract excuses its performance, if such destruction is from no default or negligence of the party who is unable to perform it. *Walker v. Tucker*, 70 Ill. 527; 3d American & Eng. Ency. of Law, 901.

This principle is applicable, we think, to the contention between these parties under the facts as they appear incontrovertibly in the evidence, and should have operated to acquit the appellant of liability to respond in damages, because of the failure to deliver the potatoes. Therefore the judgment must be and is reversed and the cause remanded.

Angelo et al. v. Angelo et al.

1. *Jurisdiction—Freehold Involved.*—The question as to whether a tax deed is invalid because of defects in the proceedings upon which it is based, involves a freehold.

Memorandum.—Appeal from a decree entered by the Circuit Court of Morgan County. The Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court on motion to dismiss the appeal, at the November Term, A. D. 1892, and appeal dismissed, a freehold being involved. Opinion filed December 2, 1892.

The opinion of the court states the case.

T. G. TAYLOR, attorney for appellants.

MORRISON & WHITLOCK, attorneys for appellees.

OPINION BY THE COURT.

This was a bill in chancery under which, by appropriate pleading, the material and substantial questions raised and presented to the Circuit Court were, as to the validity of a tax deed held by Mary Stewart, one of the appellants, for certain tracts of land involved in the proceeding. The decree of the Circuit Court was that the tax deed was invalid because of defects in the proceeding upon which it was based. This appeal seeks to have the decree of the court as to the validity of such tax deed reviewed. We are of opinion that a freehold is involved and for that reason we have not jurisdiction. *Gage v. Scales*, 100 Ill. 218; *Gage v. Bailey*, 102 Ill. 11; *Brown v. McCord*, 9 Ill. App. 550. The appeal is therefore dismissed with leave to the parties to withdraw record, abstracts and briefs.

Wells et al., Executors, etc. v. Ipperson.

1. *Verdicts.*—A verdict may be delivered in writing or orally, but in neither form does it become the verdict until it is announced and received in court. Until then the jury may change it or authorize the judge

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or clerk to change it in form or substance, and if, before it is received, the change intended is so announced by them and made in accordance therewith and recorded, the one so recorded is the only verdict in the case.

2. *Verdicts—Objections to Form.*—Objections to the form of the verdict can not be made for the first time in the Appellate Court.

3. *Instructions—Corrections in Form.*—The trial judge having read an instruction to the jury, was dissatisfied with it. He erased a part of it, and stated to the jury that he would read it again, and did so, omitting the part erased; *this was held* properly done.

Memorandum.—Action of assumpsit, use and occupation. Appeal from a judgment rendered by the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed January 30, 1893.

EXTRACT FROM THE ABSTRACT OF THE RECORD.

The jury brought into court a verdict in words and figure as follows:

We, the jury, find the claims of defendant balanced by those of the plaintiff. (Names of jurors.) Thereupon the court asked the jury if they meant to find as their verdict the issues for the defendant; to which the jury replied that they did. Whereupon the court put the verdict in form as follows:

We, the jury, find the issues for the defendant.

APPELLANTS' BRIEF.

There being different issues before the jury, the verdict, "We, the jury, find the claims of defendant balanced by those of the plaintiff," was insufficient. Thompson on Trials, Vol. II, Sec. 2639; Jones v. Snedecor, 3 Mo. 390; Talbot v. Jones, 5 Mo. 217; Carr v. Stephenson, 5 Humph. (Tenn.) 559; Tibbs v. Brown, 2 Grant (Pa.), Col. 39; Powell v. Harter, 5 Ohio, 259; Anderson v. Anderson, 4 Hayw. (Tenn.) 255; Sublett v. McLin, 10 Humph. (Tenn.) 181.

The court erred in changing the verdict in matter of substance, or suggesting such change. 1 H. Bl. 78; Thompson

on Trials, Vol. II, Sec. 2633; McConnel v. Linton, 4 Watts (Pa.), 357.

The court erred in not sending the jury back to make a proper verdict. Flinn v. Barlow, 16 Ill. 39; Smith v. Williams, 22 Ill. 357; Martin v. Morelock, 32 Ill. 485; Reed v. Thayer, 9 Ind. 157; Bass v. Hanson, 9 Iowa, 563; Thompson on Trials, Vol. II, Sec. 2639-42; Acton v. Dooley, 16 Mo., p. 441, 449.

J. C. BROADY, attorney for appellants.

APPELLEE'S BRIEF.

"It was immaterial what the written verdict contained, or what may have been its omissions or defects. The verdict of the jury was delivered orally in court by the foreman, in the presence and hearing of the other jurors. That verdict was in due form and judgment was properly rendered by the court upon it. The verdict as read by the clerk and rendered by the jury was their verdict and their only verdict." Griffin v. Larned, 111 Ill. 432.

The appellant made no objection to the action of the court below, he can not object now. By his silence he waived any error which there was in the court's conduct. Thompson on Trials, Sections 2, 700, 773; Chittenden v. Evans, 48 Ill. 52; Chicago, etc., Co. v. Goyette, 133 Ill. 21; State Bank of Illinois v. Batty, 4 Scam. 200; Wiggins Ferry Co. v. People, 101 Ill. 446; Schlenker v. Risley, 3 Scam. 483; Miller v. McManis, 57 Ill. 126; Burkett v. Bond, 12 Ill. 87; State v. Fenlason, 78 Me. 495; Dorr v. Waldron, 62 Ill. 221; Hartford Fire Ins. Co. v. City of Paris, 8 Brad. 181; Knowlton v. Fritz, 5 Brad. 217; Fireman's Ins. Co. v. Peck, 126 Ill. 493.

The supposed error was not among appellant's grounds for a new trial. He will be confined in the upper court to the reasons for a new trial specified in the court below, and will be conclusively held to have waived all causes for a new trial not there set forth in his written motion. Consolidated Coal Co. v. Schaefer, 135 Ill. 210; Utter v. Jaffry, 114 Ill. 470; Miller v. Ridgely, 19 Brad. 306; Roseboom

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v. Whittaker, 132 Ill. 81; Hunter v. Harris, 29 Ill. App. 200; Hinckley v. Cheney, 31 Ill. App. 529; Beers v. Myers, 28 Ill. App. 648; Western Union Tel. Co. v. DeGolyer, 27 Ill. App. 489.

CARTER, GOVERT & PAPE, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

This was an action of assumpsit, commenced by Edward Wells against appellee, on the 24th day of February, 1890, to recover \$225, claimed as rent for one year from March 1, 1882, and interest thereon amounting to \$81. Judgment was entered for defendant January 2, 1892, and plaintiff's appeal bond approved on the 29th. He died on the 16th of May next following, and letters testamentary were issued to appellants, who were thereupon, by order of this court, substituted as parties here.

The declaration consisted of two *indebitatus* counts, one for use and occupation, and the other on an account stated. Defendant pleaded the general issue, statute of limitations and set-off, and plaintiff replied to the second plea a new promise within five years before suit brought.

On the trial it appeared, without dispute, that defendant had occupied the premises as tenant of plaintiff for the year mentioned, and had paid nothing on account of the rent due for it; and also, that he had so occupied them for the five years next preceding, for which he had paid \$225 per year, and that no new agreement was made with plaintiff for the one in question.

It further appeared that he had occupied them continuously from 1871; at first under Menke at \$225, and afterward under Munson & Turner; that they opened a stone quarry on the demised premises, which deprived defendant of the use of nearly one-fourth of them, and that this condition continued during his tenancy under plaintiff. He claimed and testified that Munson & Turner, in consideration thereof, reduced the rent to \$200, which was all he

paid them, and no new agreement was made with plaintiff. This statement of a reduction of their rent by Munson & Turner, was positively denied by Turner, who seems to have been the active member of the firm in this matter.

Defendant also claimed and testified that during his tenancy, plaintiff, for a consideration, gave him the rent of a house on that part of the land used for quarrying; that he rented it to one Doelle, who confirmed his statement; that Doelle occupied it for six weeks and paid him the rent, which plaintiff never claimed; that after Doelle left, plaintiff rented it to three families, who occupied it for eighteen months; that he, the defendant, received none of the rent from them, and that it was worth \$6 per month. Plaintiff denied that he had turned over the rent to him, but did not deny that he rented to the three families referred to, and received the rent from them; and Doelle testified that he talked with plaintiff about renting it in 1881, when it was empty, and that plaintiff told him he had had a heap of trouble with that house heretofore, and had turned it over to Mr. Ipperson.

Near the close of the year ending March 1, 1882, a notice was served on defendant to terminate his tenancy for non-payment of rent. He says he then had wheat in the ground and to save it, settled for what was claimed to be in arrear, at the rate of \$225 per year, but then told plaintiff he had been paying \$25 too much, and would deduct it from the rent for that year, to which plaintiff said nothing. This the latter denied, saying he had never heard it claimed that the rent was at any time less than \$225.

Thus the plaintiff's demand, upon his pleading and proof, was one year's rent (\$225) with interest at six per cent from March 1, 1883, amounting to \$81—in all, \$306, and that of defendant on his proof under the plea of set-off was \$125 for overpayment, and \$108 for rent of the house received by plaintiff to his use, making a principal sum of \$233, a trifle in excess of that claimed by plaintiff.

We feel free to say that the evidence as it appears in the record does not impress us strongly in favor of this claim

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for overpayment. Irrespective of the question as to the fact of overpayment, there was no proof of the averment of the plea that it was made through any mistake of fact, even on the part of plaintiff, and a tender of the amount really due and in arrear would have been as effectual as the payment of more demanded, to save his wheat and possession.

But there were other issues involved, on either of which a finding for the defendant would be decisive of the case. It is not pretended that there was evidence sufficient to warrant such a finding under the general issue. The controlling question, then, is upon the replication to the plea of the statute of limitations. Was there a new promise by defendant to pay the rent claimed, made to the plaintiff or his agent, within five years next before the commencement of the suit?

Mr. Turner was plaintiff's agent for the collection of his rent. About the 22d of April, 1889, he and Mr. Thompson, plaintiff's attorney, went together to see the defendant, who then lived near Mendon, to collect or secure the claim. They testified that Thompson presented to him the account in writing, for principal and interest as above stated, and that they both understood him to say "right out" that he owed that debt, and would pay it. Thompson says he wanted him to agree to pay it along in the fall, when he got his wheat off, but he, defendant, said no, he did not want to pay then or would not pay then, for he had use for his stuff; that he would not pay until the first of January, but on the first of January he would pay his debt. Thompson wrote a note in pencil for the amount, but defendant refused to sign it and said he would not give any note. Thompson did not understand him to say he would pay whatever he owed on the first of January. Turner says he said he "always expected to pay whatever was due," but that he agreed as to what was the amount due and promised to pay it on or before the first of January, though he refused to sign a note for it. Thompson said they had a bottle with them, and that they went in and ate dinner with him. Each of them also admitted they had an interest in the event of the suit,

for commissions and fees. Henry Ipperson, son of the defendant, then about twenty years of age, testified that he ate dinner at home that day, and that Thompson and Turner did not eat with them; that they did not eat dinner at all that day. He was not present at the conversation between them and his father.

Defendant's statement was as follows: "Last spring Mr. Turner and Mr. Thompson came to me. I was shelling seed corn in the wheat granary. Mr. Thompson got a paper out and wanted me to sign it. He said he came there to settle Mr. Wells' rent—something about that—I do not know what he said—or, he sent him to settle that matter, and he urged me to sign that paper. He said there was three hundred and some dollars, and he got pen and ink or lead pencil, and wanted me to sign it. I told him I would not sign that. I wanted to see just how we stand; that it was seven years ago that I was off the place, and I had forgot all about it, pretty near. Well, I told him I would pay Mr. Wells about New Years, what I owed him. I did not acknowledge I owed him \$306 or \$225. He footed it up, I guess; that is, him. That is all I know. That is the way he counted it at that time. That is all that occurred between Judge Thompson and me. My two little boys, one ten and the other thirteen years old, were in the granary at the time, and no one else other than Thompson, Turner and myself. I did not read the note he wanted me to sign. I guess the amount of the note was \$306. I never said I would pay it on the first of January."

The above comprises all of the testimony bearing upon the question. That of either Thompson or Turner, if true, would show there was a new promise sufficient to take the claim out of the operation of the statute. That of defendant, if true, would show there was not. Other things being equal, two against one certainly make a preponderance. But to those who see and hear them other things are never or very seldom equal. In this case the verdict of the jurors who saw and heard them, as it appears in the record, is: "We, the jury, find the issues for the defendant."

The bill of exceptions shows, however, that they first offered the following: "We, the jury, find the claims of defendant balanced by those of the plaintiff," signed by all the jurors. This was not in proper form, even as a finding upon the issue of set-off alone. But if it was such in substance, it would seem to imply a finding for the plaintiff upon the others; for if his claim was barred by the statute or defeated under the general issue, there would have been none to balance that found for the defendant, and the verdict should have been for him for the amount so found. Yet the effect of finding for the defendant on that issue alone would be the same as such a finding upon all the issues—the judgment would be for the defendant. But this court might have found it more difficult to sustain such a finding than one upon the issue of a new promise; and, therefore, if the court dictated the change here, it was hurtful error. It appears from the bill that the court was not willing to receive the verdict first offered, and "asked the jury if they meant to find as their verdict the issues for the defendant, to which the jury replied that they did." Whereupon the court put the verdict in form as above stated: "We, the jury, find the issues for the defendant," and it was so recorded.

Counsel insist that this is not the verdict of the jury, because not shown to have been read or announced as corrected and assented to by them in open court after such reading or announcement; or, if it is, it was dictated or suggested by the leading question of the court, and so was fatally vitiated.

The verdict may be delivered in writing or orally; but in neither form does it become the verdict until it is announced and received in open court. Until then the jury may change it or authorize the judge or clerk to change it in form or substance; and if, before it is received, the change intended is so announced by them and made in accordance therewith and recorded, the one so recorded is the only verdict in the case. *Griffin v. Larned*, 111 Ill. 432; *Lambert v. Borden*, 10 Ill. App. 648, and cases there cited. If the change

made is in fact according to the intention so announced, we see no necessity for reading it to the jury as made, and getting their assent to it in open court. In this case it is conceded and shown that the verdict as recorded was according to the intention of the jury, as announced in open court. We are of opinion, therefore, that it is the verdict and the only verdict in the case. The record is conclusive upon that question.

Whether it was improperly obtained in that form by the action of the court referred to, is quite another, which does not arise upon this record. The bill of exceptions fails to show that any objection was made, or exception taken to this action; nor is it alluded to in the reasons stated for the motion to set aside the verdict and grant a new trial. It can not properly be made the subject of complaint in this court for the first time. *Chittenden v. Evans*, 48 Ill. 52; *Fireman's Ins. Co. v. Peck*, 126 Id. 493, where a long list of cases in this State is cited by the court. *Hall v. First National Bank*, 133 Id. 243.

We think the verdict, as recorded, must therefore be held valid in law; and whatever may be thought of its support in the evidence as to the other issues, see no sufficient reason for disturbing it as to the one made on the replication to the plea of the statute of limitations. Appellant's demand being barred by that statute, the judgment rendered would properly follow, unless for some other reason than an unwarranted finding upon the others.

The court, having read to the jury an instruction asked by plaintiff, and being dissatisfied with the last sentence, erased it and stated to the jury that he would read it to them again, which he did, omitting said sentence. This is complained of. We see in it no error or impropriety. The instruction, as given, is not criticised.

Finding no material error in the record, the judgment will be affirmed.

Huff v. Wolfe.

Huff v. Wolfe.

1. *Guardian and Ward*.—Agreements between a guardian and his ward fixing his compensation, though made after the ward has arrived at legal age, are to be viewed with suspicion and zealously scrutinized. It is presumed that the influence of the confidential relationship of the parties exists until final settlement and payment is made, and all transactions and dealings between them, prejudicially affecting the interest of the ward, are held to be constructively fraudulent.

2. *Guardian and Ward—Agreements Between*.—Agreements between a guardian and his ward, upon arriving at legal age, appearing to be fair and just, and not tending unduly to the benefit of the guardian, may be upheld.

3. *Evidence—Admissibility under the General Issue*.—Any evidence which tends directly to show that the plaintiff did not have a subsisting cause of action at the commencement of the suit, is admissible under the general issue.

Memorandum.—Action of assumpsit. Writ of error to the Circuit Court of Hancock County, to reverse a judgment entered by that court; the Hon. CHARLES J. SCOFIELD, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed January 30, 1893.

The opinion of the court states the cases.

G. EDMUNDS, attorney for plaintiff in error.

DEFENDANT'S BRIEF.

The trial judge, who heard all the evidence, refused to grant a new trial. The issue being one of fact and the jury having passed upon it, this court will not disturb the judgment unless it is clearly against the weight of the evidence—unless it is clearly wrong. *The Chicago & Rock Island R. R. Co. v. Crandall*, 41 Ill. 234; *French v. Lowry*, 19 Ill. 158; *Cross v. Carey*, 25 Ill. 562.

A verdict will not be disturbed unless it is manifestly against the weight of the evidence; the jury are the judges of the weight the evidence is entitled to receive, and unless their verdict is clearly wrong, it will not be disturbed. *Goodell v. Woodruff*, 20 Ill. 192; *The City of Elgin v. Rior-*

dan, 21 Brad. 600; O'Brien v. Palmer, 49 Ill. 72; Howitt v. Estelle, 92 Ill. 218.

Where the evidence is conflicting and the jury are properly instructed as to the law of the case, their verdict must be regarded as settling the controverted facts. Powers v. Cavanaugh, 17 Brad. 77; Kightlinger v. Egan, 75 Ill. 141.

SHARP & BERRY BROS., O'HARRA, SCOFIELD & HARTZEL, attorneys for defendant in error.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

In March, 1890, the defendant in error, then guardian of the plaintiff in error, presented his final report as such guardian to the County Court of Hancock County, from which it appeared that the fund so held by him amounted to \$1202.66, and that he had paid the same in full to his ward.

To the report was attached a receipt of the plaintiff in error, which states that she was then of legal age and had received full payment of the amount shown to be due her by the report.

The guardian did not then actually pay the money as shown by the report and receipt, but both parties agree that except the sum of \$200, the amount was paid soon thereafter. The plaintiff in error brought this action of assumpsit to recover this unpaid sum of \$200.

The defendant in error served as guardian of the plaintiff in error about six years, during which time he had control of her lands, rented same and made repairs and improvements thereon, collected the rents, and accounted fully therefor. During the same period of time defendant in error employed attorneys, paid them and prosecuted to a successful termination a suit for the plaintiff in error, wherein he recovered and accounted as guardian for the full sum of five hundred dollars. The defense of the defendant in error was, that prior to the presentation of his report as guardian, but after the plaintiff in error had arrived at legal age, she agreed with him that as compensation for his services as her guardian, and to reimburse him for moneys paid

for attorneys' fees, etc., about the suit prosecuted for her, he should retain out of the funds in his hands the sum of \$200, and that acting upon the faith of that agreement he asked no credit in his report for commissions, or other compensation as guardian. That to settle up the guardian's account, she gave him a receipt in full, and that he soon after paid her all but the said stipulated sum of \$200. A trial before a jury resulted in a verdict and judgment in favor of the defendant in error, to reverse which this writ of error was sued out. The court instructed the jury orally, by consent of the parties and to the satisfaction of both so far as we are advised. The records of the County Court show that no compensation of any kind or character was ever allowed the guardian. It is first urged that as no plea of set-off was interposed, all the evidence bearing upon the question of compensation to the guardian was improperly admitted. It does not appear that this objection was made in the trial court, and for that reason it ought not to be considered in this court. If this were not so the evidence offered tended directly to show that the plaintiff in error did not have a subsisting cause of action when the suit was instituted and was therefore admissible under the general issue. The statute provides that guardians shall be allowed such fees and compensation for their services as shall seem reasonable and just to the court. Chap. 64, Sec. 42, R. S. The amount to be so allowed should be ascertained and fixed by the court having charge of the trust.

Agreements between a guardian and his ward, fixing such compensation, though made after the ward has arrived at legal age, are to be viewed with suspicion and jealously scrutinized. It is presumed that the influence of the confidential relationship of the parties exists until full final settlement and payment has been made, and all transactions and dealings between them prejudicially affecting the interest of the ward, are held to be constructively fraudulent. If such contracts are, however, fair and just, and do not appear to tend unduly to the benefit of the guardian, they may be upheld. Whether the amount agreed upon by the parties in this case as the

proper "fees and compensation" of the guardian was fair and reasonable, was practically the sole contention presented to the jury. It was a question of fact. The evidence disclosed all the facts and circumstances necessary to its proper determination. The jury were advised by the proofs as to the nature, character, value and amount of the ward's property, received or taken into the control of the guardian; his acts and conduct in its control, preservation and management; the personal care and attention bestowed by the guardian upon the ward, and the value of the estate delivered to her upon the termination of the trust. They regarded the sum of \$200 as fair compensation to the guardian. There seems to us sufficient evidence to support this conclusion.

Whether the order of the County Court approving the report is conclusive, does not arise. If such an order was made the bill of exceptions does not contain it. The plaintiff in error was content to introduce in evidence only the report and the receipts given by her. She questioned the payment, though the same was fully stated in the report and receipt. The defendant in error did not seek to shield himself behind the report, the receipt or order of the court thereupon, if such an order was made, but met the case of the plaintiff in error upon the merits. Both parties have proceeded upon the assumption that the action of the court was not conclusive.

The judgment must be and is affirmed.

Mullen v. Brown.

1. *Practice—Failure to File Briefs.*—A judgment will be reversed for a failure, on the part of appellee, to file briefs as required by the rules of court.

Memorandum.—Appeal from a judgment rendered by the Circuit Court of Menard County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed January 3, 1893.

Citizens Ins. Co. v. Hamilton.

The opinion of the court states the case.

BLANE & BLANE, attorneys for appellant.

OPINION BY THE COURT.

The appellee has failed to file briefs as required by the rules of this court, and for that reason the judgment will be reversed, and the cause remanded.

Citizens Insurance Co., of Pittsburg, v. Hamilton.

1. *Arbitrators' Misconduct.*—Arbitrators duly chosen, having the matter in controversy under consideration, appointed a time and place to meet and hear evidence, etc., notified the parties, but did not themselves attend at said time and place. It appeared that on a day prior to the time set, one of the arbitrators, in the absence of the other and in the absence also of the party interested, made a partial investigation of the matter, and reported what information he had obtained in conversations with some parties having knowledge of the matter, and his conclusions to his co-arbitrator, upon which an award was rendered. In a suit to set aside the award *it was held* to be the imperative duty of the arbitrators to fix a time and place for a hearing, to give the parties notice thereof, and to hear them in the presence of each other and of all of the arbitrators, and not having done so, the award was properly declared void and set aside.

2. *Arbitrators—Practice.*—In acquiring information and knowledge upon which a conclusion is to be based, the arbitrators are required to act together.

3. *Costs in Equity Proceedings.*—The imposition of costs in chancery suits rests in the sound discretion of the court.

Memorandum.—Bill to set aside an award. Appeal from a decree rendered by the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed January 30, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF.

The parties had a right to make the agreement. They did make it, and in the absence of fraud, accident, or mis-

take, they must be bound by it. May on Insurance, (3 Ed.), Sec. 493; Woods on Fire Insurance (2 Ed.), 1013; Scott v. Ardy, 5 House of Lords Cases 811, 10 Fed. Rep. 347; C. Taylor Gauche v. London & Lancaster Ins. Co., 11 Ins. Law Jour. 361; Yeomans v. Girard F. & M. Ins. Co., 5 Id. 85; Redd v. Wash. F. & M. Ins. Co., 138 Mass. 572; Queen Ins. Co. v. Young, 86 Ala. 425.

The Circuit Court erred in decreeing that the insurance company should pay one-half the costs, upon the dismissal of the bill. The suit was commenced before the loss was due and payable and was therefore premature and should have been dismissed at complainant's costs. May on Ins. (3d Ed.), Sec. 476; Woods on Fire Ins. (2d Ed.), Sec. 462; German American Ins. Co. v. Hocking, 8 Atl. Rep. (Pa.) 589.

R. W. BARGER attorney for appellant.

APPELLEE'S BRIEF.

Each party has the right to be present at the examination made by the arbitrators, and it is the duty of the arbitrators to give both parties notice of the time and place of the hearing. It is a fundamental principle in jurisprudence, that no transaction in the nature of a judicial proceeding shall stand if the party thereto has not had an opportunity to be heard. The cases, therefore, agree in holding that whenever arbitrators fail to give this notice, their award will be a nullity. As was well said by our Supreme Court in Ingraham v. Whitmore, 75 Ill. 24: "The doctrine is well established that where an arbitrator proceeds entirely *ex parte* without giving the party against whom the award is made, any notice of the proceedings under the submission, the award is void, and it is not necessary to show corruption on the part of the arbitrator." Citing Elmendorf v. Harris, 25 Wend. (N. Y.) 693; Lutz v. Linthicum, 8 Pet. (U. S.) 178; see also to the same effect, Amer. & Eng. Enc. of Law, 685, and the numerous cases there cited. Williams v. Schmidt, 54 Ill. 205; Alexander v. Cunningham, 111 Ill. 511; Morse

on Arb. & Awards, 117-118. In *Emery v. Owings*, 7 Gill. (Md.) 488, it was held that the party ought to have notice of the time of meeting, a position so strongly supported by common justice that it will seem not to require the aid of authorities. Justice Story in *Lutz v. Linthicum*, 8 Peters, 178, said: "Without question, due notice should be given to the parties of the time and place of hearing the cause, and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside." See also, *Curtis v. Sacramento*, 28 Pac. Rep. 108, and cases there cited.

The mere fact that they drew wrong conclusions from true premises is not sufficient, for in the submission to them the parties agreed to abide their judgment on the matters submitted; but they did not agree to abide by conclusions drawn from facts materially different from those intended to be passed on. See also 1st Amer. and Eng. Ency. of Law, page 706, *et seq.*; 15 Id. 666; *King v. Armstrong*, 25 Ga. 264; *Conger v. James*, 2 Swan. (Tenn.) 213; *Rogers v. Krueger*, 7 John. 557; *Barrows v. Sweet*, 143 Mass. 316; *Eisenmeyer v. Sauter*, 77 Ill. 515; *Williams v. Warren*, 21 Ill. 541; *Pritchard v. Daly*, 73 Ill. 523.

Courts of equity will set aside awards on account of the fraud, partiality, corrupt or willful misconduct of the arbitrator in rendering the same. 1 Am. & Eng. Enc. of Law, p. 707, and cases cited.

Costs in chancery cases have always been held to be within the discretion of the court. *Edward v. Pope*, 3 Scam. 465; *Barton v. Mosher*, 62 Ill. 237. The court, undoubtedly, when it divided the costs, did so upon the assumption that neither of the parties was specially to blame for the mistake in the policy, and for the failure of the attempt at arbitration, and that therefore it would be equitable to make each party pay one-half of the costs.

CARTER, GOVERT & PAPE, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The appellee, Mrs. S. E. Hamilton, and the appellant company, being unable to agree as to the value of a building belonging to the former, which, while covered by a policy of insurance against loss by fire, issued by the appellant company, had been destroyed by fire, submitted their differences to Q. E. C. Kaemper and Joseph Buerkin, as arbitrators. These arbitrators rendered an award, fixing the value of the building at \$695.24. This is a bill in chancery filed by Mrs. Hamilton to set aside the award and to reform the policy in respect of an error made in drafting it, and also praying for a decree against the appellant company for the amount of the loss by the fire. The alleged error in writing the policy was admitted by the appellant and no complaint is made by either party to the decree, so far as the reformation of the policy is concerned.

After a full hearing upon bill, answer, replication and proofs, the Circuit Court found that the arbitrators appointed a day for the examination of the site of the burned building and for hearing evidence as to its value, and notified Mrs. Hamilton thereof, but did not themselves attend at the time and place so named and that no hearing was at any time had. That on a day prior to the day appointed for a hearing, Buerkin, one of the arbitrators, visited the scene of the fire, and in the absence of Kaemper, the other arbitrator, and of Mrs. Hamilton, made an examination of the ruins of the building and had some casual conversation with persons living near there concerning the building, its dimensions, age and value, and reported the information thus obtained and his conclusions to his co-arbitrator, and that upon this alone the award was rendered. The court further found that the building was of much greater value than the amount fixed by the arbitrators and that the award was unjust to Mrs. Hamilton, the complainant.

Upon these findings a decree was rendered setting aside and vacating the award, but as it appeared that the bill had been filed before the time allowed by a clause of the policy for the payment of the loss, the court refused to decree payment thereof, but declared and established a right in com-

plainant to an action at law upon the policy without prejudice because of the agreement to submit the matter to arbitration. This is an appeal from that decree. We have examined the proofs and think the evidence amply supports the findings of the court.

The building was totally destroyed by fire and it was necessary to a proper discharge of their duties that the arbitrators should receive proofs as to its value. This being true, it was the imperative duty of the arbitrators to fix a time and place for a hearing, and to give the parties notice thereof, and to hear them in the presence of each other and of all the arbitrators. In acquiring information or knowledge upon which a conclusion was to be based, the arbitrators were required to act together. Not having so performed their duties, the award was properly declared void by the Circuit Court. *Ingraham v. Whitmore*, 75 Ill. 24; *Alexander v. Cunningham*, 111 Ill. 511; *Vessel Owners, etc., v. Taylor*, 126 Ill. 250; 1 Amer. and Eng. Ency. of Law, p. 683 and 685.

Complaint is made of the order of the court requiring that costs be paid, one half by the appellant and the other half by Mrs. Hamilton. The imposition of costs in chancery suits rests in the sound discretion of the court, and we think the appellant has no just ground of complaint as to exercise of the discretion in this case. It was insisting upon the validity of the award and upon all advantage and benefit arising therefrom. It resisted all efforts of the appellee, Mrs. Hamilton, to free herself from the effect of the award, and in this failed. As neither party seemed to be chargeable with wrongful intent or act in the erroneous action of the arbitrators, the court very properly adjudged that each party should bear an equal burden of costs.

The decree must be and is affirmed.

Bank of Arthur v. Ellars & Humble.

1. *Partnership Funds.*—A partnership caused a sum of money to be deposited in the National Live Stock Bank, of Chicago, to the credit of the Bank of Arthur, for its (said partnership) account. The last named bank placed the amount to the individual credit of one of the members of the firm, and paid the money out on his check. In a suit by the firm to recover the money, the trial court refused to hold three propositions of law, viz.:

(1.) If the court believes from the evidence that plaintiffs, Ellars & Humble, caused funds belonging to them to come into possession of defendant, and that said Ellars & Humble did not want a firm account opened with the bank, but desired to have the funds placed to the credit of one or the other of the members of said firm, and that such firm funds had been placed prior to the transaction complained of, and that such disposition thereof had been acquiesced in by said firm, and if the court further believes from the evidence that the money in controversy was money belonging to said firm, and was placed by defendant to the credit of Humble, either with or without the special direction of the firm, or either of them, but in accordance with a method of doing business before that time acquiesced in by said firm, and that said money was paid to said Humble on his individual check after having been placed to his account—then the judgment in this case ought to be for defendant.

(2.) The placing of partnership funds coming into the possession of a bank to the credit of one of the members of the firm when the firm has no firm account with such bank, and desires not to have one, and payment to said member of said funds on his individual check, is payment to the firm.

(3.) If the court believes from the evidence that defendant received the money in controversy as funds belonging to the firm of Ellars & Humble, and paid the same to Humble as a member of said firm, then the plaintiffs, Ellars & Humble, can not maintain a suit at law in the firm name, although the court may believe from the evidence, as between Ellars and Humble, Humble had no right to receive said money.

It was held, that if the consent of Ellars be not implied, the payment was good as to Humble, and being a complete satisfaction as to one of the parties, a court of equity is alone competent to grant the relief which the firm seeks by this action of assumpsit. The holding was incorrect, as the evidence tended strongly to support the propositions.

Memorandum.—Assumpsit. Appeal from a judgment rendered by the Circuit Court of Douglas County; the Hon. EDWARD P. VAIL, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed January 30, 1893.

Bank of Arthur v. Ellars & Humble.

APPELLANT'S STATEMENT OF THE CASE.

James Ellars and William Humble, as partners, under the firm name of Ellars & Humble, were engaged in buying and shipping stock in the village of Arthur. The partners were to share profits and losses equally. Prior to the formation of the partnership, Ellars had an individual account with the Bank of Arthur, and Humble, also. Each of the partners also bought stock on his private account. No firm account was kept with the bank. The firm sent a sum of money to the bank, which received the money, but instead of placing it to the credit of the firm of Ellars & Humble placed it to the credit of the individual account of Humble, without consulting the firm, or either member of it, and without any direction from the firm or either member of it. The money was received November 17, 1891.

Humble drew checks against his individual account, but did not know that this amount had been placed to his credit, until the difficulty about this item arose between the bank and the firm; and this did not arise until December 10th, three or four weeks after the credit had been made. Neither Humble nor Ellars received a statement of their accounts between the time of its credit to Humble and the 10th of December.

APPELLANT'S BRIEF.

In the case of Church v. First National Bank of Chicago, 87 Ill. 68, Ellenwood, a member of the firm, drew out a balance of \$1,700 of firm funds on his check and had it placed to his individual credit, and afterward used it in his private business. Suit by the firm against the bank in assumpsit for the amount so drawn out and appropriated by Ellenwood. There was judgment below for the bank. The court say: "Without entering upon the controverted questions of fact we think the judgment below must be affirmed because the plaintiffs have misconceived the tribunal to which they should resort for relief."

"It is very clear the payment of the \$1,700 is good as against the plaintiff, Ellenwood. He can not be heard to

say it was in fraud of the rights of his copartners, and as to him the payment is a complete satisfaction as to the cause of action. Being complete as to him it is in a court of law good as to his copartners, and a court of equity alone is competent to grant the relief to which they claim to be entitled."

CHAS. BENNETT and J. F. HUGHES, attorneys for appellant.

APPELLEES' BRIEF.

"If a deposit is made in the name of a firm, and the bank pays it out on the individual check of one of the firm in his own name only, it can only justify by showing that the money thus drawn was applied to the use of the firm." Sec. 116, Newman on Bank Deposits; Sec. 220, Boone on Corporations; Coote v. Bank of U. S., 3 Cranch, (U. S. C. C.) 50.

The money was the property of the firm, and as firm property the bank received it. Before the bank could deposit it to the account of Humble, the consent or concurrence of both partners was necessary to accomplish the severance of the joint title and convert an asset into individual property; one partner can not appropriate the money to himself or to another partner, nor can a majority do so. Sec. 544, Bates on Partnership.

Where a bailee of the firm uses its property to pay the debt of one partner an action by the firm is sustainable, for such partner is not repudiating his own act in joining as co-plaintiff. Wright v. Ames, 2 Keys (N. Y.), 221; see also Harts v. Byrne, 31 Ill. App. 260; Brewster v. Mott, 4 Scam. (Ill.) 378; Rogers v. Batchelor, 12 Pet. (U. S.) 221; Viles v. Bangs, 36 Wis. 131; Davis v. Smith, 29 Minn. 201; Thomas v. Penrick, 28 Ohio St. 55.

ECKHART & MOORE, attorneys for appellees.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

The appellee firm caused the sum of \$476.59 to be deposited in the National Live Stock Bank of Chicago, to the credit

Bank of Arthur v. Ellars & Humble.

of the appellant bank for the account of the appellee. The appellant bank placed the amount to the credit of the individual account of William Humble, one of the members of appellee's firm, and paid the money upon his individual check. Humble was not then indebted to the bank and the question of the application of firm assets to the payment of the individual indebtedness of a partner does not arise. The case was submitted to the court without the intervention of a jury, and the finding and judgment being against the appellant bank the case is brought here for review.

It appears from the evidence that each member of the appellee firm had an individual account upon the books of the appellant bank and that they did not desire that a firm account should be kept by the bank. We think it further shown that a prior course of business between the firm and the bank was such as authorized the bank to place the amount to the credit of the individual account of either member of the firm, and pay it out upon his individual check, leaving the partners to adjust their partnership interest and rights between themselves as they had uniformly before that done. The payment to Humble must be deemed, if we are right as to the effect of the evidence, to have been with the implied consent of Ellars, the other member of the firm, and if so, it can not be recovered back either at law or in equity to satisfy any demand Ellars may have against the firm. *Davis v. Atkenson*, 124 Ill. 474.

Even if the consent of Ellars be not implied, yet the payment is good as to Humble. Being a complete satisfaction as to one of the parties, a court of equity is alone competent to grant the relief, which the firm seeks by this action in *assumpsit*. *Church v. First National Bank*, 87 Ill. 68, and cases there cited.

The court refused to hold as correct a proposition of law to this effect, and as the evidence tended strongly to support such a proposition, the judgment must be reversed. This case must be distinguished from cases where a right of recovery at law or in equity in the name of the firm has been sustained on the ground that an individual creditor of the

firm knowingly received payment out of the partnership funds, or where there was a wrongful misappropriation of partnership funds or property without the consent, express or implied, of the other partner. Whenever the act complained of is done with the consent, express or implied, of the injured partner, no right of action exists to recover the funds or property for the benefit of the partners, though it may be that if the firm is insolvent a suit in equity may be maintained for the benefit of the creditors of the firm. *Church v. First National Bank, supra*; *Davis v. Atkenson, supra*; 17 Amer. and Eng. Ency. of Law, pages 1247 and 1248.

The judgment must be and is reversed and the cause remanded.

Meeth v. Rankin Brick Co.

1. *Practice—Conduct of Jury Trials.*—It is to be desired that the deliberations of juries should be free from circumstances calculated to prevent a full and fair consideration of the matters committed to their decision. After a long trial it is to be expected that some or all of the jury will be fatigued, mentally as well as physically, and if, at the hour which they and most men are accustomed to sleep, they are forced to decide a case, it will not be strange if they fail to decide it correctly.

2. *Evidence—Production of Books and Papers.*—Sec. 9, Ch. 51, R. S., providing that the several courts shall have power in any action pending before them, upon motion and good cause shown and reasonable notice thereof given, to require parties to produce books or writings in their possession, or which contain evidence pertinent to the issue, was designed to invest courts of law with more power than they had previously exercised in reference to the production of private writings.

3. *Power of the Law Courts to Require the Production of Books, etc.*—The power of courts to require the production of papers, etc., should be used with circumspection. The statute requires "good and sufficient cause shown" as a prerequisite. Such cause should be shown by affidavit particularly pointing out the necessity and propriety of the desired order of the court requiring the production of such books, etc., so that the court can see that the applicant is really in need of the same to enable him to fairly present his cause of action or his defense, and that the application is for no improper or ulterior purpose.

4. *Books of Original Entries—Ledgers.*—It is error for the court to

48	602
87	405
48	602
109	607
e109	608

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permit a party to offer in evidence, entries and portions of books, which are merely ledgers and not books of original entry, or to permit the book-keepers of such party to testify as to other portions of said books, when they know nothing as to the truth of the entries, etc.

Memorandum.—Assumpsit. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed January 30, 1893.

APPELLEE'S STATEMENT OF THE CASE.

Appellant is a stone and brick mason and contractor, who, not having financial ability sufficient to take building contracts in his own name, made an arrangement with appellee to take contracts in its name for his benefit. Under this arrangement, appellee was to advance appellant as it might be needed, money to pay the laborers, and was also to pay for the materials other than brick, used in the buildings to be erected. The brick for the buildings was to be bought by appellant from appellee. A number of buildings were erected under this arrangement, and as a result appellant became indebted to appellee about \$1,900 for brick. Appellee tried to get a settlement with him, and was about to bring suit, when appellant sued appellee, claiming that he was working by the day for appellee as a superintendent; that he had not bought the brick from appellee at all, and that instead of owing appellee for brick, appellee was owing him anywhere from \$800 to \$2,500 as "reasonable compensation" for his services as a superintendent for appellee.

APPELLANT'S BRIEF.

The legal points in the case are: (1.) Improper haste of trial. (2.) Admission of improper evidence. (3.) Not compelling defendant to produce books, pay rolls and papers according to notice served before trial to be used in evidence for plaintiff. (4.) Improper modification of instructions. (5.) Verdict unsupported by law or evidence.

Unusual haste is ground for review and reversal. *Bell, Administrator, v. Gardner et al.*, 77 Ill. 321.

The admission of books as evidence without proof that they are books of original entry. Starr & Curtis, Chap. 51, par. 3.

A ledger is not book of original entries against the memorandum book from which the entries are compiled. McCormick v. Elston et al., 16 Ill. 204, and cases there cited. Bently v. Ward, 116 Mass. 333; Villmer v. Schell, 35 N. Y. Sup. C. 67; Lawhoen v. Carter, 11 Bush. (Ky.), 7; Woolsey v. Bohn, 42 N. W. Rep. 1122.

Appellant was entitled to the production of books, pay rolls, and papers in the possession of appellee in accordance with the notice served on them to produce them, and it is error in the court to refuse an order on appellee to produce the same. Rigdon v. Conley, 31 Ill. App. 634; Starr & Curtis, Chap. 51, par. 9.

Appellee had no right to put the ledger in evidence after having been notified to produce their books, pay-rolls and papers, and having refused so to do, it was error to admit the same. Holton v. Mason, 21 Mich. 364; Doe v. Hodgson, 4 P. & D. (Va.), 142; Wharton on Evidence, Sec. 157; Greenleaf on Evidence, page 649, Sec. 560 and note.

The modification by the court of an instruction, which embraces a proper exemplification of the law, is wrong and is ground for reversal. Cohen v. Schick, 6 Ill. App. 280.

A verdict unsupported by law or evidence must be reversed, and that new trial should have been granted. Booth v. Hynes, 54 Ill. 363; Southworth v. Hoag, 42 Ill. 446; Reynolds v. Lambert, 69 Ill. 495; City of Chicago v. Lavelle, 83 Ill. 482; Hibbard v. Molloy, 63 Ill. 471; Stanton v. Dudley, 64 Ill. 325.

PEIRCE & PEASLEY, attorneys for appellant.

KERRICK, LUCAS & SPENCER, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

The appellant brought assumpsit against the appellee to recover for personal services rendered in superintending

certain building operations conducted by the appellee; also for the use of his team and for money advanced by him for benefit of appellee.

It was denied by appellee that appellant performed any services as alleged, or that he made such advances, and it was claimed that in the transactions referred to, he was really carrying on the operations for himself, though the contracts were in the name of the appellee; that the brick used in the buildings was furnished by appellee, and that appellant owed therefor to appellee about \$1,900.

A trial by jury resulted in a verdict for the appellee, and judgment was rendered against appellant for cost. The evidence was conflicting. That for the plaintiff strongly tended to sustain his position. That for the defendant was as positively the other way as to all the work superintended by the plaintiff (except the sewer and a cistern which the defendant conceded were built by it), and it was shown that the plaintiff, instead of being the superintendent, was himself the contractor in fact, and was indebted to the defendant for the brick used in the various buildings. It was for the jury to settle this conflict. As to all, except the sewer and the cistern, that was the issue. Was the plaintiff acting for himself or for the defendant? If the former, he owed the defendant a large sum for brick. If the latter, the defendant owed him a large sum for labor, use of team and money advanced. We are at a loss to see how a jury could have found the issues for the defendant without also allowing the defendant under its plea of set-off, at least \$1,800 for brick.

Considerable complaint is made that the case was unduly hurried, and that the trial was pressed until a late hour Saturday night, when the jury was sent out to consider of their verdict.

It is certainly to be desired that the deliberations of juries should be free from circumstances calculated to prevent a full and fair consideration of the matters committed to their decision. After a long trial it is to be expected that some or all of the jury will be fatigued, mentally as well as phys-

ically, and if at the hour when they, and most men are accustomed to sleep, they are forced to decide the case, it would not be strange if they failed to decide it correctly.

It is better to let them rest, as the judge himself would wish to do if the jury had been waived, before proceeding to a decision. The conduct of the case in this respect, as in many others, is so far within the discretion of the court, that an appellate tribunal would not be warranted in setting aside the judgment for this reason, unless it was quite apparent that the action of the court had unduly prejudiced the rights of the appellant. We are unable to say that such was the case here, though we are somewhat impressed with the suggestion that the jury were not so deliberate, and perhaps not so accurate as probably they would have been under less pressure.

It is also urged that the court erred in refusing to require the defendant to produce certain books and papers relating to the transactions involved in the controversy. Notice was given to produce these matters in evidence, but the court ruled that the failure to do so, only gave the plaintiff the right to offer secondary evidence of their contents. Our statute, section 9, chapter 51, provides that the several courts shall have power in any action pending before them, upon motion and good cause shown and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power, which contain evidence pertinent to the issue. This statute was designed, no doubt, to invest courts of law especially with more power than they usually exercised in reference to the production of private writings. Courts of chancery had always quite freely exercised coercive authority in this respect.

In the latter tribunals, the pleadings seeking such relief were usually, if not always, under oath, and in proceedings at law, where the authority was exercised rarely and with cautious limitations, the application was supported by the affidavit of the party showing the circumstances. 1 Green. Ev., Sec. 559.

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Evidently, such power should be used with circumspection, lest it be abused, and the statute requires "good and sufficient cause shown" as a prerequisite. No such cause was shown here, unless it can be said it was apparent, from the circumstances and the proof already developed in the course of the trial. We are disposed to hold that such showing ought to be by affidavit particularly pointing out the necessity and propriety of the desired order, so the court can see that the applicant really needs it to enable him to fairly present his cause of action, or his defense, and that the application is for no improper or ulterior purpose. We find no error in the action of the court in this respect.

It is objected further, that the court erred in permitting the defendant to offer certain entries in the books, as evidence in their behalf, and in permitting the bookkeepers, Newberg and Harvey, to testify as to the contents of other portions of said books. It appears that these books were not really books of original entry, but were nothing more or less than ledgers, as to most, if not all, of the entries. Newberg knew nothing as to the truth of the entries, nor did Harvey.

It is not vigorously insisted, by counsel for appellee, that the ruling upon the points was free from error, but it is urged that, "as the appellee's entire claim, as shown by the books, was disallowed by the jury, the appellant was not harmed by the ruling."

It should be remembered that the vital issue was whether the plaintiff was working for himself or for the defendant. It will not do to assume, because the jury did not find for defendant on the plea of set-off, or, as counsel puts it, disallowed the claim of the appellee, that the evidence offered by the books was disregarded and had no effect in producing the verdict. Those books showed rebates on various jobs and charges for brick, and, in fact, were, throughout, strongly in support of defendant's theory of the case, that the plaintiff was the real contractor.

It is impossible to say the jury were not influenced

by such proof; but, on the contrary, it is almost a certainty that it had considerable weight with them.

Of course, as heretofore noticed, the verdict was inconsistent with either theory of the case, but this evidence tended very decidedly to disprove the plaintiff's theory and no doubt it was more or less effective in that direction.

Objection is urged as to the modification of the plaintiff's instructions, but the point is not very forcibly presented, and upon reading all the instructions in connection with the evidence, we do not find any substantial cause of complaint.

It is also urged that in numerous instances, the court sustained objections to questions asked by the plaintiff, and overruled objections to those asked by defendant. There are so many of them that it would be impossible to notice them in detail, and after carefully reading the abstract, we are unable to say that on the whole any grave error appears.

Some pertinent questions put by appellant were indeed overruled, but we can not say that the matter they called for was not elicited by other questions, and many questions which were leading in form and were merely repetitions of others, were allowed. All these matters are largely within the discretion of the trial court and error can not be successfully assigned thereon unless it is probable that some harm resulted. As the case must be again tried, it is to be presumed these causes of complaint will not be repeated. Hence, it is not necessary to dwell further upon the point.

For the error above indicated the judgment will be reversed and the cause remanded.

Skaggs et al. v. Kincaid et al.

1. *Foreclosure—Sales en Masse.*—Ordinarily, a decree of foreclosure may be wholly silent as to the order in which the premises shall be offered for sale, but when the mortgaged lands consist of separate government subdivisions belonging to different persons, the decree must so

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direct the order of sale of the lots or tracts, as to preserve the rights and equities of the separate owners. A decree absolutely requiring such premises to be sold in one body in the absence of imperative reasons, can not be upheld.

2. *Guardian ad Litem—Formal Answer.*—The answer of a minor, by his guardian *ad litem*, although formal, is sufficient to interpose any defense which appears in his behalf in the evidence.

3. *Sales en Masse, Authorized by Trust Deed.*—A decree in foreclosure absolutely requiring the premises to be sold in one body, in the absence of imperative reasons for such a course, can not be upheld, and the fact that the trust deed, upon which the proceedings are had, contains a clause authorizing a trustee in his discretion to sell the property *en masse*, can not avail to support such a decree.

Memorandum.—Bill in chancery. Writ of error to reverse a decree for defendant rendered by the Circuit Court of Menard County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed March 6, 1893.

STATEMENT OF THE CASE BY THE COURT.

On the 2d day of January, 1887, Charles Skaggs and Yarra Tilda Skaggs, his wife, executed a trust deed in the nature of a mortgage to Edward Lanning, trustee, upon 200 acres of land in Menard County to secure a note given by the husband, Charles, to James M. Robbins, in the sum of \$2,500. A clause in the trust deed authorizes the trustee in his discretion to sell the land in a body if default be made in the payment of the notes. Robbins assigned the note to Lee Kincaid, one of the appellees. On the 2d day of April, 1878, Charles Skaggs and wife conveyed a certain forty-acre tract of the mortgaged lands to their son, James B. Skaggs. In April, 1879, James B. Skaggs died, seized of the title to said forty-acre tract of land (subject to the lien of the mortgage or trust deed to Robbins) and left surviving him, Jane, his widow (now Jane Kilpatrick), and the following children: Clara (now Colson), Cynthia, Annie, Emma and Fannie, to whom descended the title to said tract of forty acres. In April, 1879, Charles Skaggs and wife, Yarra Tilda, conveyed another forty-acre tract of the mortgaged lands to their son, Charles V. Skaggs; he, in 1885, conveyed it to his mother, Yarra Tilda Skaggs, who died intestate, on

the 20th of January, 1890, seized of the title to such tract, subject to the mortgage or trust deed. Yarra Tilda Skaggs left surviving, her husband, said Charles Skaggs, and three daughters and eight sons and five grandchildren (children of James B. Skaggs, her deceased son), to whom her title in said tract of land descended according to the statute in such cases.

In May, 1890, Kincaid, the holder of the note, and Lanning, the trustee, filed this bill in chancery to foreclose the trust deed, making Charles Skaggs, the mortgagor, the children of Yarra Tilda Skaggs, deceased, and the widow and children of James B. Skaggs, deceased, parties defendant.

A guardian *ad litem* was appointed for Fannie Skaggs and Emma Skaggs, infants, children of James B. Skaggs, deceased, who filed for them a formal answer. Charles Skaggs, the mortgagor, and Cyrus Skaggs, his son, by the same solicitor, filed a joint answer admitting the allegations of the complainant bill, and at the same time, by the same solicitor, who was also the solicitor for the complainant in the original bill, filed a joint cross-bill in which it is alleged that the conveyance of forty acres of the land to James B. Skaggs, and the conveyance of a like tract to Charles V. Skaggs, some eleven years before, was each made upon the verbal agreement of the respective grantees that each would pay one-half of the mortgage debt to Lanning, as trustee, together with all interest thereupon; that neither paid anything, but that Charles Skaggs, the father, had paid all interest upon the debt. The cross-bill claims a vendor's lien in favor of Charles Skaggs upon each of said forty-acre tracts and prays for a decree in his favor accordingly. The cross-bill further alleges that in April, 1887, a judgment was rendered in the Cass County Circuit Court against Charles Skaggs for some \$992.86, which was revived in 1887 and assigned to Cyrus Skaggs, his son, and co-complainant in the cross-bill—and that in November, 1887, another judgment was rendered in the Circuit Court of Cass County, Illinois, against Charles Skaggs and Moses Skaggs, his son, in the sum of \$1,519.83—which was

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revived in 1886 and purchased by, and assigned to, Cyrus Skaggs. That execution issued upon such judgment to Menard County, and had been levied upon all interest of the judgment debtors in the lands mentioned in the mortgage, whereby the cross-bill claims a lien was created upon all rights and interests of the judgment debtors, in the land subject to the lien of the trust deed or mortgage, and also to the homestead right of Charles Skaggs in the land. To this cross-bill a merely formal answer for the said infants, Fannie and Emma Skaggs, was filed by a guardian. Lee Kincaid and Edward Lanning, trustee, answered, admitting that the allegations of the cross-bill were true. All other defendants to the original and cross-bill were defaulted—and the case was referred to the master to take and report the evidence. The bill of exceptions does not purport to contain the evidence heard by the master. The master's report as to his findings and conclusions from the evidence is incorporated in the bill of exceptions. These findings support the original bill and the cross-bill and find that there is due to Kincaid on the notes secured by the trust deed \$2,759.57 by Cyrus Skaggs on the judgments mentioned in the cross-bill; \$4,504.44 to Charles Skaggs as upon the vendor's lien claimed in the cross-bill; the sum of \$2,552.93 upon the tract of land conveyed to James B. Skaggs, and a like sum against the tract of which his wife died seized, and the master also finds Charles Skaggs entitled in lieu of his homestead to \$1,000.

A decree followed, which orders that Charles Skaggs pay the complainants in the original bill \$2,759.37, and that the heirs of James B. Skaggs, deceased, pay Charles Skaggs \$2,552, and the heirs of Yarra Tilda Skaggs pay Charles a like sum, to remove the liens which the decree declared and established in favor of Charles against the lands of such parties respectively. The decree then provides that in case Charles Skaggs fails to pay the amount ordered to be paid by him to the complainants in the original bill, that the master sell the entire mortgaged premises (200 acres in all) *en masse*, subject to redemption, and out of the proceeds pay,

first, the cost of the proceeding; then \$2,759.57 to Lee Kincaid (the complainant in the original bill); then \$1,000 to Charles Skaggs for his homestead; next the cost due on the execution issued from the Cass Circuit Court; and the remainder, so far as necessary, to Cyrus Skaggs upon the judgment execution and levies against Charles Skaggs.

The master sold the lands *en masse*, to Cyrus Skaggs, for \$8,625.03. This is a writ of error to obtain a reversal of the decree.

PLAINTIFFS' BRIEF.

Under the established principles of equity, not only should there not have been a requirement to sell *en masse*, but on the contrary the decree should have provided for a sale in separate tracts, in the inverse order of their alienation by Charles Skaggs; the 120 acres to be sold before the two forties. *Iglehart v. Crane*, 42 Ill. 261; *Tompkins v. Wiltberger*, 56 Ill. 385; *Allen v. Jackson*, 122 Ill. 567; *Moore v. Shurtleff*, 128 Ill. 370.

The adult defendants did not plead the statute of limitations, but the answer of the infant defendants, by their guardian *ad litem*, demanded strict proof, and prayed the protection of the court. Under this answer all defenses that could be legally availed of, under any answer, are to be considered as interposed on behalf of the minors. *Stark v. Brown*, 101 Ill. 395; *Gilmore v. Gilmore*, 109 Ill. 277; *Lloyd v. Kirkwood*, 112 Ill. 329; *Waugh v. Robbins*, 33 Ill. 181; *Cartwright v. Wise*, 14 Ill. 417.

N. W. BRANSON and T. W. McNEELY, solicitors for plaintiffs in error.

EDWARD LANING and CHAS. NUSBAUM, solicitors for defendants in error.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This decree is inequitable and highly unjust to the heirs of both Yarra Tilda Skaggs and James B. Skaggs. It

requires the master to sell, *en masse*, lands belonging to different owners. Charles Skaggs owned 120 acres. The heirs of Yarra Tilda Skaggs, forty acres, and the heirs of James B. Skaggs, forty acres. The absolute requirement that it be sold *en masse*, was a practical denial to the heirs of the persons named, of the right of redemption of their separate tracts from the sale. While the complainants had a lien upon all the land and had the right to have it all devoted to the payment of the mortgage indebtedness, if necessary, the rights and equities of the different owners required that it first be offered for sale in different and separate lots, and so sold, if satisfaction of the decree could thus be obtained. Ordinarily a decree of foreclosure may be wholly silent as to the order in which the premises shall be offered for sale, but when the mortgaged land consists of separate government subdivisions, belonging to different persons, the decree should so direct the order of sale of the lots or tracts as to preserve the rights and equities of the separate owners.

A decree absolutely requiring such premises to be sold in one body, in the absence of imperative reasons for such a course, can not be upheld.

The decree under consideration forbids a sale of the tracts separately, and this we regard as a fatal objection to it.

The clause in the trust deed, authorizing the trustee, in his discretion, to sell the property *en masse*, can not avail to support the decree.

An abuse of such discretion would not have been permitted in a sale made by the trustee. As James B. Skaggs and Yarra Tilda Skaggs, owners of the equity of redemption respectively in separate tracts of land, had died, sale could not be made by virtue of the power of sale in the trust deed, because of the provisions of the statute forbidding the execution of such powers in the event of the death of the owner of an equity of redemption. Sec. 13, Chap. 95, R. S.

The trustee and the owners of the note, because of such statutory provisions, were forced to ask the aid of the court, and they joined in this bill in chancery to obtain sale of the land under the equitable powers of the court.

The prayer of their bill is that the "usual decree may be made for the sale of the mortgaged premises," and such, under the circumstances of this case, should have been the extent of the relief granted them.

The master derived power to sell, not from the trust deed, but from the action of the court, and the clause in the mortgage which authorized the trustee to sell in a body, gave no such power to the master.

The decree should be reversed for other reasons growing partially out of the error of selling the land in a body.

A sale thus made would bring into the hands of the master a sum of money produced by the sale of property a part of which belonged to Charles Skaggs, another portion to the heirs of Yarra Tilda Skaggs, and still another to the heirs of James B. Skaggs.

The decree deals with this fund without regard to the rights of the parties whose property was seized and sold to produce it. Out of such sum the master is ordered to pay James Skaggs \$1,000, to recompense him for releasing his homestead right in the land belonging to him, a matter in which the heirs of Yarra T. and James B. had no interest or concern. Out of the same fund the master is ordered to pay the complainants in the original bill, the balance of the mortgage indebtedness, and then to apply the remainder of the fund (if necessary) to the payment of the amount decreed to Charles Skaggs, by way of vendor's lien upon the property of the heirs of Yarra T. and James B., respectively.

These liens were against the property of those deceased persons, separately, yet, under the provisions of the decree, both tracts, together with other tracts belonging to Charles Skaggs, are to be sold in a body, and the proceeds applied indiscriminately and without regard to the value of the tracts, to extinguish separate liens upon certain of the tracts. The right of Charles Skaggs to relief by way of the vendor's liens, rested upon the assumption that the grantees of the separate tracts had each agreed to pay as the purchase money of their respective tracts one-half of the mort-

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gage debt and interest thereon, as specified in the trust deed. Under the decree, the proceeds of the sale of their tracts are not only charged with the payment of such vendor's liens, but also required to contribute to the payment of the balance unpaid of the original mortgage indebtedness, thus imposing upon the heirs of Yarra Tilda and of James B. Skaggs the burden of twice paying, or partially making double payments of the same indebtedness.

The decree should have directed the sale of the lands in parcels, and disposed of the proceeds according to the rights and equities of the different parties. Whether the decree should have ordered the master to apply the amount awarded Charles Skaggs in satisfaction of his "vendor's lien" claims upon executions and judgments held by Cyrus Skaggs against Charles, is a question that the plaintiffs in error can not raise. If erroneous, it affects only Charles Skaggs, and he alone can complain.

The answer of the minors by the guardian *ad litem*, though only formal, was sufficient to interpose any defense that appeared in their behalf in the evidence. *Stark v. Brown*, 101 Ill. 395.

The errors that we have pointed out in the decree clearly entitle the infant plaintiffs in error to a reversal, and the rights and interest of all the plaintiffs in error are so interwoven that relief can not be granted to a part of them only. The decree will therefore be reversed as to all.

We have only the report of the master and can not, therefore, determine whether the claims of Charles Skaggs, upon which the alleged vendor's lien rests, were barred or not. The disposition we make of the decree will open the case and admit such defenses as any of the parties may be advised to interpose. We can not anticipate the state of facts that will be developed upon another hearing, and therefore refrain from passing upon points made by counsel which may not again arise.

The decree will be reversed as to all the plaintiffs in error, with directions to the court to set aside the default of each of the plaintiffs in error who may desire to plead, answer

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or demur to the original or cross-bill, and to further proceed to a final hearing of the cause, and to such decree as may be found consistent with the views here expressed. Reversed and remanded with directions.

Penwell Coal Mining Co. v. Diefenthaler, Administrator, etc.

1. *Corporations, etc.—Duty to Make Works, etc., Reasonably Safe.*—It is the duty of a corporation to use ordinary care to make its works and appliances reasonably safe and fit for their intended uses.

2. *Corporations—Duty in Employing Agents.*—With a corporation the work of planning, selecting material for, making and placing appliances and constructions required in its business must of necessity be intrusted to natural persons as its agents. Its duty in this respect requires of it no more than to take ordinary care, and appoint for the work such agents as are competent and likely to do it properly.

3. *Instructions—Statement that Certain Facts Amount to Culpable Negligence, Error.*—While a person (Robert H. Kuhn) employed as a blacksmith and a doer of general work about a coal mine was assisting the superintendent to prop up the pocket chute, then containing several tons of coal, it fell upon him and killed him. He had, himself, helped to construct the chute originally, and was as well acquainted with its condition as the company or any of its officers. A suit for damages brought by his legal representative resulted in a verdict of \$3,500. It was sought to sustain the verdict upon the grounds, viz., the insufficiency of the chute on account of its construction to sustain the weight put upon it, and the dumping of coal into it while the deceased was at work under it, both of which were charged as negligence on the part of the company; on the trial the court gave the following instruction for the appellee: "The court instructs the jury if they believe from the evidence that the chute was out of repair and unsafe, and that it was known to the defendant, and that the manager for the company ordered the deceased to help about the chute in propping it up, and at the time the chute was heavily loaded with coal, and while deceased was under the chute, endeavoring to prop it up, coal was being dumped into the chute, of which the deceased was not informed, this would be culpable negligence under the circumstances." *It was held error*, because it informs the jury that certain facts amount to "culpable negligence" and by it the jury must have understood that the "culpable negligence" was actionable negligence, warranting and requiring a verdict for the plaintiff. Its hypothesis does not include the necessary element on the

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part of the deceased, that at the time of the accident he was using due care, etc.

4. *Instruction Not to Withdraw Evidence from the Jury.*—The court also erred in giving for the plaintiff the following instruction: “If the jury believe from the evidence that said Robert H. Kuhn was called by the manager to assist about said chute, and the manager knew it was dangerous and risk was incurred in working about it, and he did not inform the deceased of said danger, and the deceased did not know of it, then the company was guilty of culpable negligence on account of such conduct of its manager.” The instruction withdrew from the consideration of the jury all evidence tending to show that the supposed ignorance of the deceased was due to his own fault.

5. *Instructions, Presumptions of Law Asserted to be Conclusive.*—The court erred in instructing the jury that “if they believe from the evidence that the deceased was in the employ of the defendant, and the foreman of the company directed the deceased to help about the chute just before it fell, then it was his duty to obey, and if he went under it with the foreman, then the law would presume the deceased used due care under all circumstances, and that he would not rush recklessly into danger if he knew it,” for the reason that it asserts a presumption of law to be conclusive, arising upon the facts that the deceased was in the employ of the company and was directed by its foreman to go under the chute as he did; these facts being undisputed the jury was bound to find that the deceased did exercise all due care on his part.

Memorandum.—Action by personal representatives for death by negligence, etc. Appeal from a judgment for \$3,500, in favor of plaintiff, rendered by the Circuit Court of Christian County; the Hon. JESSE J. PHILLIPS, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and reversed. Opinion filed March 6, 1893.

The opinion states the case.

APPELLANT'S BRIEF.

Negligence is a question of fact which must be left to the determination of the jury. Galena & Chicago Union R. R. Co. v. Dill, 22 Ill. 271; Pennsylvania Co. v. Frana, 112 Ill. 405; L. S. & M. S. Ry. Co. v. Parker, 131 Ill. 564; I. C. R. R. Co. v. Slater, 139 Ill. 199; St. Louis Bridge Co. v. Miller, 138 Ill. 465; Kolb v. O'Brien, 86 Ill. 211; Graves et al. v. Colwell, 90 Ill. 620.

The plaintiff could only recover for the negligence charged in the declaration, and not for any negligence. Camp Point Mfg. Co. v. Ballou, Admr., 71 Ill. 419; C., B. & Q. R.

R. Co. v. Payne, 49 Ill. 500; C., C. & I. C. Ry. Co. v. Troesch, 68 Ill. 545.

E. A. HUMPHREYS, JR., JOHN E. HOGAN and JOHN G. DRENNAN, attorneys for appellant.

ANTHONY THORNTON, attorney for appellee.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

Robert H. Kuhn was employed by appellant as a blacksmith and to do general work about its mine at Pana. On the 19th of July, 1890, while assisting the superintendent to prop the pocket chute, then containing several tons of coal, it fell upon and killed him. He left a widow and three young children for whose use this action was brought, which resulted in a verdict for \$3,500 damages, and judgment thereon.

The main chute was of the usual kind, about ten feet wide and thirty in length, twenty-two above ground at the upper end and slanting at an angle of thirty degrees. Its bottom was tight from the tippie for a distance of five feet, and the rest of the way of iron rods, two inches apart, to make a screen through which the slack dropped into the pocket. This was of the same width, about three feet deep at the lower end, lessening to nothing at the upper end of the screen. Its capacity was six to eight tons, and when full up to the screen bars this slack made a solid floor for the main chute, over which the coal, as dumped into it, slack and all, would pass down it into cars on the switch track below. Coal so delivered was called the "mine run," and much of the product of this mine was so delivered. The pocket was, therefore, full for some time almost every day.

It was fastened to the upper chute by six or eight iron rods. The two opposite at the upper end went through the beams or large plates of the main chute and the stringers of the pocket, bolting them close together. The other opposite

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pairs, which were longer because of the increasing depth of the pocket, also went through these beams, but passed down the outsides of the stringers, then under them at a right angle, and then up them on the insides, three inches, at another right angle, making rectangular hooks in which the stringers rested. Studding and boards nailed to both also helped to support it.

It was made and put up by the company's carpenter and blacksmiths, about the first of May, 1890, to take the place of one in previous use which the president thought was not close enough to the main chute. John Edgar, the carpenter, had an experience of twenty years in his trade, and had worked for Mr. Penwell, the president, for a year, but this was the first he did about the mine. Josiah Reed, the principal blacksmith, had worked at his trade for eighteen years, eight of them for coal mining companies, of which the last three were for appellant. Kuhn, his assistant, had had less experience, and had worked for Reed for over three years, and been his assistant at the mine of the Pana Coal Company; was thirty-eight years of age, running a separate fire and considered a competent blacksmith.

The only specific directions given, were to make it closer to the main chute, without a door, and of straight timber, and they were expressly charged to use the best material, do the work as well as they could, and make it strong and safe, to bear all the strain that would be put upon it.

The two survivors claim that they did so, as far as they know. Edgar testified that the lumber used was of the best he could find in the yard, being all select bastard pine, which is very strong. The stringers were six by six inches, into which the cross pieces, four by six, were mortised two by six, and the floor was of two-inch boards with sheet iron over it. Reed and Kuhn did the iron work together; the one about as much as the other. The rods used were seven-eighths inch round, being a size larger than they thought necessary. They both knew, as did Edgar, all about the chute, how it was constructed and supported, and what was to be required of it. Reed and Edgar conferred and agreed upon

the hooks, to avoid the weakening of the stringers by boring. Reed understood that bending them, as they did, would weaken the iron to some extent, but his judgment, formed mainly from experience, was that, bent as they were, they would bear many times the weight to which they were to be subjected. He and Kuhn talked about this while making them.

When finished they all pronounced it an excellent job. Mr. Henley, the superintendent, though not a mechanic, so considered it. The employes about the mine were constantly passing under it and nobody appears to have had a thought of danger from it. Mr. Rutledge, the State Mine Inspector for that district, specially qualified by large knowledge, both theoretical and practical, to judge of the matter, testified from a general observation of it, when his attention was called to it by the superintendent, that it appeared to be all right, and that the method of supporting by hooks, as here, was used "in places, but not generally." He noticed these rods sufficiently to be satisfied that they were "reasonably safe." The pocket was filled every day or nearly every day, but showed no sign of weakness until a week or two before the accident, when it appeared that the second cross piece from the lower end was cracked and the third slightly "swagged" or bent. These were then strengthened by putting under and bolting to each, along its whole length, a bar of iron three inches wide and three quarters of an inch thick. Reed and Kuhn did this work also, and both were satisfied that it made them "a great deal stronger" than they were originally and that they would stand.

On the morning of the accident, the superintendent observing that the pocket was about two-thirds full, and knowing it was to be filled and to remain full for a longer time than usual, determined to put a prop under it. He testified very positively that he did not know or fear it was dangerous; that he saw no indication of its weakness, but because of the crack above mentioned, and the intention to keep it full so long, he did so "to avoid any possibility of

danger." As he was going for the prop he saw Kuhn standing in his shop door and beckoned to him to come along. A few moments later they were seen together under the chute, the superintendent pointing up. Then they proceeded to place the prop, but finding it too short, Kuhn got down on his knees to put something under it. The superintendent at that moment heard a crack as of breaking wood and ran, calling on Kuhn to do likewise. The fall followed on the instant. Henley barely escaped, but Kuhn was caught and crushed. Some of the cross-pieces were found to be broken, some of the hooks straightened out and others broken off. Samuel Collins, a witness for the plaintiff, was sitting on a car by the chute and saw the fall; other witnesses whose opportunity to know was, perhaps, not so good, leave it uncertain which part first gave way, but he thought it was the hooks. He had stopped his car within twenty-five or thirty feet from the men, to see them place the prop. They were both under the chute trying to prop it at about the middle. A box or carload of coal was dumped into the main chute while they were so employed, and almost immediately thereafter he saw the middle hook on the north side begin to spread and the fall followed instantly. He thought the timbers were broken, not by the weight upon them but by the fall on uneven ground. Several of the witnesses testified that the coal was dumped at the tipple of the main chute which was supported by a large upright post, and having to pass down five feet before it would be screened, would have no effect upon the pocket if it was full, and if not full, only to the extent of the additional weight dropped upon it through the screen bars; and that the coal cars, which were of different capacities, would lose, by screening, from 1,000 to 1,200 pounds.

Such are the material facts as shown by the record. It is said that the justice of the verdict may be maintained on either of two grounds, viz., the insufficiency of the chute, on account of its construction, to sustain the weight put upon it, and the dumping of the coal while the deceased was at work under it, by order of the superintendent, both of which are charged as negligence on the part of the company.

But to maintain it on the first of these grounds it should further appear that the defect in construction, if any there was, was known, or by the exercise of ordinary care would have been discovered by the company before the injury was done, and was not known, nor by the exercise of ordinary care would have been discovered by the deceased.

If appellant had no such knowledge or means of knowledge, it could not have been guilty of any negligence in respect to the construction; for that is but another way of saying that it took ordinary care to make the chute reasonably safe and fit for its intended use, which was the full extent of its duty in the premises. *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 624-5, and cases there cited. And if the deceased had such knowledge or means of knowledge, he did not exercise ordinary care for his own safety (*C. & E. I. R. R. Co. v. Hines*, 132 Ill. 168), and his failure to do so, would bar this action.

In neither of these cases could the verdict stand upon the second ground stated, as an independent cause of action. For it is clear that both appellant and deceased knew the chute was constructed to be filled almost daily and by just such dumping as was here shown. Then if appellant used due care in its construction and was innocently ignorant of the defect, it could not be blamable for using the chute as it was intended and made to be used; and if the deceased knew, or by due care would have known of the defect, then he voluntarily assumed the risk he incurred from such use.

It can not well be claimed that in the act of dumping, or in the time, manner or amount of it, there was anything unusual, not to have been expected, or in any respect negligent, unless it was done in view of defects in the chute which were known or ought to have been known to appellant. The case for appellee must therefore stand, if at all, upon the first ground stated, namely, negligence on the part of appellant in respect to its construction, and due care for his own safety on that of the deceased.

The defects complained of are not specifically set forth in the declaration, but as indicated by the evidence and stated

in the argument, are the insufficiency of the timbers and hooks to sustain the weight they were intended to bear; and the questions of fact were (1), did appellant exercise ordinary care to make them reasonably safe and sufficient for that purpose; (2) did it know, or would it have known, by taking ordinary care to ascertain, that they were not sufficient, and fail to use ordinary care to make them so, before the accident occurred, and (3) did the deceased in going under it, as he did, exercise ordinary care for his own safety?

We do not propose to consider the evidence in detail. From the statement already made, we think it clear that upon each of these questions the case was, to say the least that should be said for appellant, a close one. Appellant was a corporation. The work of planning, selecting material for making, and placing the chute, was of necessity to be intrusted to natural persons as its agents. Its duty required of it no more than to take ordinary care to appoint for this work, only such agents as were competent and likely to do it properly. Cooley on Torts, pp. 550-1 and note, 557 and note 1; Warner v. Erie Ry. Co., 39 N. Y. (12 Tiffany) 468; Cooper v. Hamilton Mfg. Co., 14 Allen, 193; Brown v. Carrington Cotton Co., H. & C. (Hulstrom & Coltman, exchequer,) 511; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; Consolidated Coal Co. v. Scheller, 42 Ill. App. 619. The insufficiency of the work done, whether through the incompetency or carelessness of the agent, would not be evidence of a want of such care in his appointment. A contrary rule would make the employer a guarantor to each, of the competency and faithfulness of all its other employes. The structure here required was a plain, if not a rough one, of wood and iron. Appellant had in its employ experienced, and so far as appears, except for this work, competent and faithful mechanics in wood and iron work. To whom else, then, would appellant, in the exercise of ordinary care, intrust it? It may be that Edgar had never before made, or assisted in making, just such a structure, but so far as the wood work was involved, it was clearly within the line of the business he had

followed for twenty years; he knew just what was wanted and for what use, and the old chute was to some extent a guide. The blacksmiths had had some special experience, in connection with the chute of the Pana Coal Company.

Then it may be safely said, that the employment of these men, with the instruction expressly given as to the materials and work, strongly tended to prove due care on the part of appellant to make the chute reasonably fit for its intended use.

Edgar, called as a witness by plaintiff, was asked to tell the jury what he told Henley, after he got through with his work, about its sufficiency, and his answer was: "What I spoke about, the chute was all right and looked very well. I was a little bit afraid to load coal with a 'mine run,' with constant usage. We had not got some things in it quite heavy enough." The record does not make it clear that he expressed this fear to the superintendent. But the next question was: "Did you mention to him what?" and he answered, "No, sir; I don't think I did." On his cross-examination, he was asked if he did not say, in substance, that it was the best job he ever saw completed for a chute, and answered, "Yes, sir, a great deal better job than the one here."

It stood the test of two months' use, being often filled to its utmost capacity, without showing a sign of weakness. During all that time, the timbers, rods and hooks were in plain view, and many persons must have seen them. The employes about the mine were constantly passing under them. Henley called the attention of the inspector to the work, as if with pride in it. Nobody appears to have observed any defect in the construction. Then when the two cross-pieces showed the need of it, they were promptly repaired in a manner and by means that have not been criticised. Whether the weakness shown by them was in their size and material, or due to some latent defect, does not appear; but it is to be noticed that the first cross-piece from the bottom, which was of the same size and material, though subjected to a greater weight, showed none.

If appellant was chargeable with actual notice or suspicion of the alleged defects, or any other, before the accident, it was through Henley, its superintendent. It is so claimed and so only. Yet it must be admitted there was strong evidence to the contrary. His own testimony was most direct and positive. Of even greater weight is the fact that he exposed himself to the danger as freely and fully as he exposed the deceased. No higher test of his sincerity and veracity could be required. In the absence of evidence to the contrary, the presumption from his conduct is that he did not know there was danger. *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 169. That he recognized the possibility of danger, and took extraordinary care to meet it, can hardly be said to contradict or weaken his testimony, corroborated by his act.

Upon the third question—that of due care on the part of the deceased—the evidence for appellant was, perhaps, still stronger. If there was any one thing about the construction of this chute which the appellant knew or ought to have known and which the deceased did not also know, or have abundant means of knowing, by the exercise of ordinary care, it has not been pointed out, nor have we been able to discover it from the evidence. We understand it to be claimed that the defect which caused the fall was the use of the hooks described, as the means of support, and it is said that this was not only patent, but “absurd.” Then who knew it or should have known it better than the blacksmith who acquiesced in the plan and helped to make the hooks, with full knowledge of the purpose, and ample means of knowing the strain they were to bear?

It appears that he was employed to do general work about the mine when not occupied as a blacksmith. He therefore knew that he, like other such employes, was liable to be called upon, in the course of his employment, to work or pass under this chute, and had a personal interest, besides a duty to his fellows and the company, to know its condition as to safety. If it was unsafe and he knew it, or by ordinary care would have known it, and yet voluntarily exposed

himself to injury by its falling, he could not complain of such injury, if living, nor can his representative, the appellee. The event shows it was unsafe. Assuming that the company knew, or ought to have known it, the question remains, did not he also know it, or was he not bound equally with the company to know it?

Upon this question the case was certainly close enough to require that the instructions to the jury should be clear and accurate.

Appellant insists that those given for the plaintiff were not. The first, it is said, ignores the question of Kuhn's knowledge of the cause of the injury. But it includes in the hypothesis stated the fact that the chute fell upon and killed him while he was in the employ of the company, and "in the exercise of reasonable care."

In *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 168, the Supreme Court say: "The allegation of due care in the deceased negatives negligence, and, by implication, that he had knowledge of the defects by reason of which he was injured. * * * The allegation is therefore sufficient on error, if, indeed, it should be admitted that it would not be so on demurrer;" and we presume the implication from the same language in an instruction would be the same, and so avoid this objection.

The second and third are complained of as making negligence a question of law, and thus invading the province of the jury. By the second it is declared that if the chute was out of repair and unsafe, and known to the defendant to be so, and its manager ordered deceased to help about propping it, and at the time it was heavily loaded with coal, and while he was under it, endeavoring to prop it, coal was being dumped into it, of which he was not informed, "this would be culpable negligence under the circumstances."

In *L. S. & M. S. Ry. Co. v. Johnsen*, 135 Ill. 647, speaking of alleged negligence on the part of the plaintiff, it was said: "The court can never be called upon to say to a jury that negligence has been established as a matter of law, unless the conduct of the injured party has been so clearly

and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent. 'Negligence can not be conclusively established by a state of facts upon which fair-minded men may well differ.' C. & E. I. R. R. Co. v. O'Connor, 119 Ill. 586; T., H. & I. R. R. Co. v. Voelker, 129 Id. 540. Unless the negligence of the plaintiff is proven by such conclusive evidence that there can be no difference of opinion as to its existence upon a mere statement of the facts, the jury must pass upon it."

Of course the same rule must apply to the case of alleged negligence on the part of the defendant.

For appellee it is contended that this instruction is fairly within the exception allowed; that the facts supposed, absolutely necessitate the conclusion, drawn as a matter of law, that there could be no condition, or, at least, that there was no evidence in this case of any condition, consistent with those facts, that would cause any fair mind to dissent from or hesitate about it.

We do not concur in this view of the instruction. It closes with the conclusion quoted, by which the jury must have understood that the "culpable negligence" mentioned was actionable negligence, warranting and requiring a verdict for the plaintiff. With that meaning, we think it was materially wrong. Its hypothesis does not include the necessary element of due care on the part of the deceased. It limits the ignorance of dangerous conditions to the fact that coal was being dumped into the chute while he was at work under it, and does not exclude the supposition that even that was due to "culpable negligence" on his own part. It is entirely consistent with all the facts, hypothetically stated, to suppose, and there was evidence strongly tending to prove, that he knew, or that it was his own fault if he did not know, as well as appellant, the condition of the chute as to safety, and the extent to which it was already loaded, and the custom and course of business at the mine, according to which it was liable to have more coal dumped into it while he would be under it. See Pennsylvania Co. v. Stoelke, 104 Ill. 204. The jury should have

been allowed to consider the evidence tending to prove these conditions, as bearing upon the question of due care by the deceased, and if they found he failed to exercise it, their verdict should have been for the defendant, notwithstanding the fact stated in the instruction.

The third was as follows: "If the jury believe, from the evidence, that said Robert Kuhn was called by the manager to assist about said chute, and the manager knew it was dangerous, and risk was incurred in working about it, and he did not inform the deceased of said danger, and the deceased did not know of it, then the company was guilty of culpable negligence on account of such conduct of its manager."

This also withdrew from the consideration of the jury all the evidence tending to show that the supposed ignorance of the deceased was due to his own fault. It may well be doubted whether he was in fact ignorant of any danger that was known or ought to have been known to the manager; but if he was, there certainly was evidence tending to show it was because he culpably neglected to use his means of knowledge. How could he have failed to know as much about the chute itself? And as to the dumping, which is the only other danger suggested, his shop was only about ninety feet from the chute, and he had worked about the mine long enough to know from the course of operations there, that coal was liable to be dumped at any time, whenever it was ready. If he did not know it was to be dumped while he was to be under the chute, neither does it appear that the manager did. It would seem that he was as clearly bound as the manager to know if danger was to be apprehended from that cause, and might as well have insisted that before going under it the chute should be emptied and the operation of dumping suspended.

The fourth holds that the commands of its representative "are the commands of the company and the company are responsible for any injury resulting from such commands;" which is complained of as not limiting the right of recovery to injury from the negligence charged in the declaration.

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We do not see how this, if error, could have prejudiced the defendant in this case; but we think it objectionable for another reason; that the company is not so liable if the negligence of the party injured, materially contributed to such result, and the evidence required that modification of the instruction. Like those above noticed, it ignores the substantial and prominent defense, supported by no little proof that the deceased knew or is chargeable as if he knew the danger to which he exposed himself.

The seventh was as follows: "The court instructs the jury that if they believe from the evidence, that the deceased was in the employ of the defendant, and the foreman of the company directed the deceased to help about the chute just before it fell, then it was his duty to obey, and if he went under it, with the foreman, then the law would presume the deceased used due care under all circumstances, and that he would not rush needlessly into danger if he knew it."

This instruction, unlike the others, recognizes the defense referred to, as attempted, but meets and defeats the attempt by a presumption of law which is asserted to be conclusive, arising upon the facts that deceased was in the employ of the company, and was directed by its foreman to go under the chute as he did. These facts being undisputed, the jury was bound, regardless of all others, to find that the deceased did exercise all due care on his part.

We know of no authority for holding this presumption conclusive. *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 168-9, the only case cited in support of the instruction, holds it to be matter of defense that the deceased had knowledge of the defects through which his injury was received; but the court adds: "Unless it shall appear, from the evidence, that he had such knowledge, it will not be presumed, since no one is presumed to knowingly incur physical pain and death, where he can avoid it at his discretion." This does not touch the question of the effect of a direction by the employer to the employe, but only the presumption from the natural instinct of self-preservation, and holds it to be rebuttable. That instinct and duty would have required the deceased in

this case to refuse obedience to an order which endangered his life or limb, if he knew or apprehended such danger.

Whether he did know it or ought to have known it, was a question clearly raised by the evidence, and the jury should have been allowed to consider and decide it. This instruction, upon the admitted facts, decided it for them as a matter of law. If he was "bound to obey" the direction, as it absolutely asserts, he could not, in obeying, be guilty of negligence, however reasonably, strongly and clearly he may have apprehended the fatal consequence. But he was not so bound.

The misleading effect of the errors above indicated could not be corrected by the instructions given for the defendant. Therefore the judgment will be reversed, and the cause remanded.

Palmer et al. v. Wood et al.

1. *Parties in Chancery—Adjudication under Void Order.*—Where persons came into court, under a notice and order of the court requiring all creditors of a defunct banking institution, having claims similar to those of the complainants in the suit, to appear and manifest their demands, and subsequently the court set aside the order, as having been illegally entered, and dismissed the parties brought in under it, *it was held* that there was no adjudication as to the claims held by these parties. They came in under one order of the court and retired under another, holding the former one to have been inadvertently made, and were left in *statu quo*, the same as if their names had never appeared in the case.

2. *Pleading in Chancery—Pure Pleas, etc.*—A pure plea, as known in chancery practice, must set up some matter not appearing on the face of the bill.

3. *Anomalous Pleas.*—Anomalous pleas, or pleas not pure, rely upon matters stated in the record, and upon denials and negations of matters of fact contained therein, which, if true, constitute a sufficient defense against further proceedings in the suit.

4. *Statute of Limitations in Chancery.*—When the objection that the statutory period has elapsed appears on the face of the bill, a demurrer will lie; but if it does not so appear, a plea of the statutory bar will be proper.

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5. *Limitations—Equity Follows the Law.*—In equity, where there is concurrent jurisdiction with courts of law, the statute of limitations will be equally binding; but there are many cases where equity acts, not so much in obedience to the law of limitations, as in analogy to it. Aside from the cases where the statute may be applied, lapse of time will, in many cases, constitute a bar to equitable relief.

6. *Death of a Party.*—Where, in a suit in chancery, a party defendant dies after the cause is submitted and while under advisement, the court may, upon rendering the decision, dismiss the bill as to deceased party (no administrator having been appointed), or may enter its decree *nunc pro tunc* on motion of the complainants, or possibly the surviving defendants.

7. *Statute of Limitations—Administrator of Deceased Stockholder—Plea of, by.*—The administrator of a deceased stockholder may successfully plead the statutory limitation of two years as to the estate in his hands to be administered upon.

8. *Creditor's Bill Against Stockholders of a Defunct Corporation.*—A creditor of a corporation may, after judgment against it and return of execution *nulla bona*, file a creditor's bill against one or more stockholders delinquent for non-payment of stock subscriptions. It is not indispensable that all should be joined; a delinquent stockholder may, by cross-bill, bring in other delinquent stockholders and enforce contribution.

9. *Losses—How Ascertained, etc.*—The "losses," for which these stockholders are liable to depositors, are not to be ascertained by deducting the assets of the corporation from the claims of the depositors, but the latter may seek from the stockholders full payment of whatever is due from the corporation.

10. *Liability of a Stockholder.*—The liability of the stockholder is regarded as primary, and he must make good the unpaid balance due the depositors, regardless of what may be realized from the corporate assets.

11. *Parties—Persons in Interest Not Always Necessary.*—In a suit against the stockholders of an insolvent corporation, it is not necessary that all the stockholders should be made parties. The rules and practice which might well apply to different cases, requiring all persons interested to be brought in, do not apply to cases of this kind.

Memorandum.—Proceedings in chancery against stockholders. Appeal from a decree rendered by the Circuit Court of Sangamon County; the Hon. JACOB FOUKE, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

APPELLANTS' STATEMENT OF THE CASE.

This is a proceeding in equity by Wood and others, com-

plainants, who sued not only for themselves, but for all others having like rights and equities. The bill was filed August 24, 1886, and the claim by complainants is, that they are creditors of the Springfield Savings Bank, a corporation, by virtue of the charter granted by the legislature of Illinois (see Pr. Laws 1867, Vol. 1, page 62); that the defendants and others, as stockholders of said bank, are liable to complainants for their respective claims, under the provisions of the charter of the bank. The bill avers and the proof shows, that after the organization of said bank, and the transaction of business for some ten years or more, to wit, on the 17th day of December, 1877, the bank suspended business and became insolvent, at which time defendants and others were stockholders. The bank never resumed business, but on the 17th day of April, 1879, it assigned all its assets and property to Virgil Hickox, for the benefit of its creditors. John S. Bradford was, on the 19th day of September, 1879, appointed assignee of said bank, in the place of said Hickox, who had resigned. Bradford was acting as such assignee before and at the time of filing the bill. At the time of the failure, 17th December, 1877, the bank was indebted to complainants and others. The capital stock of the bank was, by its charter, fixed at \$100,000, divided into 1,000 shares of \$100 each.

The stockholders' liability sought to be reached, is not for unpaid stock, but a liability under the charter provision reading: "The stockholders of said corporation shall be responsible in their individual property in an amount equal to the amount of stock held by them respectively, to make good all losses to depositors or others."

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Appellees are equitably estopped from prosecuting this suit for the reason that they have been guilty of such delay in bringing their suit that it would be inequitable to grant the relief they seek. Their right of action was complete on the 17th day of December, 1877, and their suit was not brought until August 24, 1886, a period of over eight years.

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Above all things, equity requires diligence of him who would solicit its aid. It will not come to the aid of the laggard and enforce his stale claim. *Brink v. Steadman*, 70 Ill. 241; *Pomeroy's Equity*, Vol. 1, Sec. 418.

A defense peculiar to courts of equity, is that founded upon mere lapse of time, and the staleness of the claim, in cases where no statute of limitations directly governs the case. Vol. 2, *Story's Eq. Juris.*, Sec. 1520; *Carpenter v. Carpenter*, 70 Ill. 457.

W. L. GROSS and PALMER, SHUTT & DRENNAN, attorneys for appellants.

C. A. KEYES and R. L. MCGUIRE, attorneys for appellees.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This case was before us at the November term, 1890, reported in 40 Ill. App. 182, under the style of *Wood v. Wood*, and was reversed and remanded for a reason there stated. The Circuit Court proceeded to another decree and the record is before us again, on the appeal of defendants Wood, Palmer, Helmle and Reisch.

The point principally argued is that the court below refused to set down for argument the pleas which had been adjudged bad by the court prior to the former decree. The position is assumed that the reversal of that decree opened the case throughout to be heard *de novo*. The action of the court in refusing to again consider the pleas amounted in substance to holding them bad, and the question arises whether they should be so regarded.

These pleas were on behalf of Helmle, Palmer and Reisch only. Wood filed neither plea nor answer, and suffered a default to be taken as to him.

The first plea set up the decree in the Queenan case as a bar. The second set up as a bar the statute of limitations, five years. The third set up the Queenan decree as a bar as to certain of the present complainants.

The complainants referred to in this plea had come into

the Queenan case, not as original complainants, but under a notice and order of the court, requiring all creditors having claims similar to those of the complainants filing the bill to appear and manifest their demands. Subsequently, the court held that this order, under which they came in, was entered without due consideration, and therefore set the same aside and dismissed the parties so brought in, from the case.

It is now suggested that this amounts to an adverse adjudication upon their claims, and therefore they are barred. We can not accede to this view. There was no adjudication whatever as to the claims held by these parties. They came in under an order of the court, and they retired under another order of the court, holding the first order to have been inadvertent. Thus, these parties were left in *statu quo*, and they were in the same position as to the other complainants in the present case, whose names nowhere appeared in the Queenan case.

The fourth plea set up the non-joinder of Nolte, Bateman and Johnson, who were also stockholders, as defendants to the bill. No error is assigned as to this plea, specifically, but the subject-matter of it is presented under another assignment of error, which will be noticed further on.

The first and third pleas may be considered together, and they are disposed of by our holding, when the case was formerly here, that the Queenan case constituted no bar to the depositors who were not parties thereto.

No argument is presented in support of the second plea, setting up the statute of limitations five years, and we may perhaps assume counsel to concede the plea is not good. A pure plea, as known in chancery practice, must set up some matter not appearing on the face of the bill. Story's Eq. Pl. Sec. 660. Anomalous pleas, or pleas not pure, rely upon matters stated in the record, and upon denials and negations of matters of fact contained therein, which denials and negations, if true, constitute a sufficient defense against further proceedings in the suit. *Ib.* 667.

When the objection, that the statutory period has

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elapsed, appears on the face of the bill, a demurrer will lie. If it does not so appear, a plea will be proper. *Ib.* 751. Assuming that the relief here sought would be barred by the statute of limitations five years, the objection appears on the face of the bill. Hence, the plea was unnecessary, and according to strict rules of equity pleading, improper.

The plea here filed was not a "pure" plea, for it was not founded on new matter not apparent on the face of the bill; nor did it answer the description of an "anomalous" plea.

It appears from the evidence, and the report of the master, that in proof of each claim, the depositor produced a pass-book, or a certificate of deposit.

In *Fleisher v. Rentchler*, 17 Brad. 402, which was a proceeding at law upon a liability similar to that here involved, it was held that the written evidence contained in a certificate of deposit, issued by the bank, was as binding upon the stockholder as upon the corporation, and that the action was not barred until after the lapse of ten years; and in *Schalucky v. Field*, 124 Ill. 617, it was so held as to the written evidence contained in a depositor's pass-book.

In the present case the lapse of five years would not bar the remedy. If the proceeding were at law the limitation would be ten years. In equity, where there is concurrent jurisdiction with courts of law, the statute of limitations would be equally binding. But there are many cases where it is said that equity acts not so much in obedience to the law of limitations, as in analogy to it. Aside from the cases where the statute may be applied, lapse of time will, in many cases, constitute a bar to equitable relief.

Where resort is had to chancery to enforce a statutory liability, it is quite clear the statute of ten years should be applied, and that no delay short of that time should hinder the proceeding. This view will also dispose of the argument in behalf of appellants, that the remedy is barred by *laches*, the bill being filed some eight years after the bank suspended.

It is objected that appellants are credited with the amounts paid by them in the *Queenan* case without any-

thing in the pleadings upon which to base such credits; that this action is purely voluntary, a mere matter of grace and favor, and without evidence in the record on which to ascertain the proper amounts.

As it is not objected that the proper amounts were not really credited, we see nothing here of which appellants may complain; but it appears that the master's report upon which the court acted contains among other matters a copy of the decree in the Queenan case from which the amounts adjudged against each of the defendants in that case can be ascertained. The objection is also made that Tracy and Salter were dismissed. This is met by the finding of the decree that they took no appeal from the former decree, and that they paid the amounts adjudged against them.

These two were small stockholders, each having ten shares. Tracy was a party to the Queenan case, and presumably might have been credited in this case with what he paid in that; but he preferred to pay rather than to join in the former appeal. Salter was not a party to the Queenan case. The amounts paid by these two stockholders, aggregating \$383, were deducted from the total of the amounts due complainants. It is not suggested that the total for which these two were liable would exceed the amount they paid; nor that the appellants have suffered any substantial increase of their burden by reason of this action of the court. If any such there be, it is quite unimportant in amount, and in the absence of a specific objection at the time when the order of dismissal was made, should not be regarded as a ground for reversing the decree.

It is objected that John S. Bradford was dropped from the case. The decree finds that after the cause was submitted, and while under advisement, John S. Bradford died, and that his administrator had not been appointed; therefore it was ordered that as to said Bradford, the bill be dismissed.

This was necessary unless the court entered its decree *nunc pro tunc*, which it might have done, and perhaps would have done, if moved so to do by the complainants, or possi-

bly by the surviving defendants. The effect is the same as though Bradford had never been made a party defendant, and in this connection we may notice the objection that Nolte, Bateman, Johnson and other stockholders were not made defendants.

The question is, whether a number of depositors may jointly file a bill in chancery against a part only of the stockholders, or whether a decree against such stockholders will be fatally defective because of the non-joinder of the others.

We held in this case, when it was formerly in this court, that the administrator of a deceased stockholder might successfully plead the statute of limitations two years, as to the estate in his hands to be administered, and it is apparent there may be various circumstances, which would work great hardship to the depositor, if all the stockholders must be joined.

It has been held that a creditor of a corporation may, after judgment against it, and return of execution *nulla bona*, file a creditor's bill against one or more stockholders, delinquent for non-payment of stock subscriptions. It is not indispensable that all should be joined. Yet, in such case the delinquent stockholder may, by cross-bill, bring in other delinquent stockholders and enforce contribution. *Clapp v. Peterson*, 104 Ill. 26; *Young v. Farwell*, 139 Ill. 326; *Hatch v. Dana*, 101 U. S. 205; *Cook on Stock & Stockholders*, Sec. 206, and cases cited in note 3. The authorities are, however, not uniform.

We are inclined to hold that where, as in this case, the proceeding is merely to reach the statutory liability of stockholders, and where the complainants do not seek, and are not required to seek, relief by winding up the corporation, it is not necessary that all the stockholders should be made parties to the bill.

Those who are brought in may, perhaps, by cross-bill, and certainly by independent suit, reach their fellow-stockholders and enforce contribution, but the depositors should not be required to await the result of that controversy.

Various questions might arise between the stockholders, the adjustment whereof would bring delay, to which the depositors should not be subjected. The litigation might be prolonged, necessarily or collusively, by disputes, not concerning the creditors, until they, despairing of the end, would accept whatever they could get by compromise. The benefit of the statutory liability would thus be greatly impaired. As was said in *Marsh v. Burroughs*, cited in *Hatch v. Dana*, *supra*, referring to liability for unpaid subscriptions: "If a creditor were to be stayed until all such parties could be made to contribute their proportionate share of the liability, he might never get his money."

Rules of practice that might well apply to ordinary cases, requiring all persons interested to be brought in, should not apply in cases like this. All such rules are for the furtherance of justice, and as new cases and new conditions arise, should be so moulded or modified as to attain that end. *Cook on Stock & Stockholders*, Secs. 223 and 224.

It is also urged that the decree took no account of the assets of the corporation, assuming it had something valuable in that respect.

As was settled by the ruling of the Supreme Court in *Queenan v. Palmer*, 117 Ill. 619, the "losses," for which these stockholders are liable, are not to be ascertained by deducting the assets of the corporation from the claims of depositors, but the latter may seek from the stockholders full payment of whatever is due from the corporation.

The liability of the stockholder is regarded as primary, and he must make good the unpaid balance due the depositor, regardless of what might be realized from the corporate assets.

We find no substantial error in the record, and the decree will be affirmed.

Foval v. Benton.

1. *Mortgage Foreclosure—Prior and Subsequent Mortgagees—Parties.*
—When a prior mortgagee is made a party to a foreclosure suit by a second mortgagee, there should be a distinct allegation in the bill, of the purpose

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for which prior mortgagee is brought in, and if it is intended to assert the invalidity of the prior mortgage, or that for any reason it should be subordinated to the second mortgage, there should be an averment of the facts relied upon, so that an issue may be made up on the pleadings. Under the general allegation that a party has, or claims to have, some interest in the mortgaged premises or some part thereof, as purchasers, mortgagees, or otherwise, which interests, if any, accrued subsequent to the lien of the complainant's mortgage, the party holding the prior mortgage is not bound to set up his rights in respect thereto, and is not affected by a decree taken *pro confesso* against him.

Memorandum.—Mortgage foreclosure in chancery. Appeal from a decree rendered by the Circuit Court of Calhoun County; the Hon. GEORGE W. HERDMAN, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893

The opinion of the court states the case.

APPELLANT'S BRIEF.

A decree *pro confesso* binds the party to an admission of everything properly alleged in the bill. And a prior adjudication between the same parties is conclusive, not only as to matters actually determined, but as to every other thing which might have been, by the exercise of reasonable diligence, submitted for adjudication in the same suit. Garrick v. Chamberlain, 97 Ill. 620; Hawley v. Simons, 102 Ill. 115.

A mortgagee may make prior incumbrancers parties to a suit in foreclosure, and have a decree for a sale of the land free from all incumbrances. Hilliard on Mortgages, Vol. 2, Sec. 60; Vanderkemp v. Shelton, 11 Paige (N. Y.) 28.

By her default and the decree against her, appellee is now equitably barred and estopped from this foreclosure. Jones on Real Estate Mortgages, Sec. 1441; Dawson v. Danbury Bank, 15 Mich. 489; Diekerman v. Lust, 66 Iowa, 444; First Nat. Bank v. Salem Cap. Flour Mills Co., 31 Fed. Rep. 580.

The judgment is conclusive between the same parties and their privies upon all matters embraced within the issue in the action, whether the issue was joined by the defendant or left unanswered. Jones on Real Estate Mortgages, Sec. 1439; Goebel v. Iffla, 18 N. E. Rep. (N. Y.) 649.

E. A. PINERO and WITHERS & RAINEY, attorneys for appellant.

APPELLEE'S BRIEF.

Possession is notice to all the world of the occupant's claim to real property. *McConnel v. Reed*, 4 Scam. 117; *Williams v. Brown*, 14 Ill. 200; *Cowen v. Loomis*, 91 Ill. 132; *Conner v. Goodman*, 104 Ill. 365.

The actual occupancy of premises is notice equal to the record of the deed, or other instrument, under which the occupant claims, and a subsequent purchaser takes subject to whatever right, title or interest such occupant may have. *Coari v. Olsen*, 91 Ill. 273; *Stagg v. Small*, 4 Brad. 192; 95 Ill. 39; *Brainard v. Hudson*, 103 Ill. 218; *Rupert v. Mark*, 15 Ill. 546; *Prettyman v. Wilkey*, 19 Ill. 235.

The open and visible possession of premises is sufficient to charge a purchaser with notice of a legal or equitable claim of the occupant. *Brown v. Gaffney*, 28 Ill. 149; *McConnel v. Reed*, 4 Scam. 117.

Fraud is never presumed, and in all business transactions good faith is presumed until the contrary is shown. The evidence must sustain the allegations of fraud. *Wood v. Moore*, 7 Brad. 134; *Johnston v. Worthington*, 8 Brad. 322; *Shinn v. Shinn*, 91 Ill. 477; *Jones on Mortgages*, Sec. 1439.

F. M. GREATHOUSE, solicitor for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was a bill to foreclose a mortgage given by Herman Stahl and wife to the appellee, to secure payment of a debt of \$1,000, evidenced by the promissory note of said Stahl, dated November 25, 1882, payable to the appellee five years after date. The bill also sought to correct a mistake in the description of the property.

The appellant, Foval, who was made a party defendant, set up a defense that he had acquired a title to the property under a sale on execution against the mortgagor, subsequent to the complainant's mortgage, and also by the foreclosure of a mortgage given by said Stahl and his wife, to one Arnold.

The last named mortgage was executed a few days subsequent to that of the complainant, but it is insisted that the decree rendered in the suit to foreclose it, to which the complainant was made a party, is a complete bar of all rights of the complainant in the premises.

The bill to foreclose the second mortgage was brought by the mortgagee, Arnold, but by amendment it appeared that Foval had become the assignee of the debt and security, and he was therefore substituted for Arnold as complainant. Said bill made the mortgagors, and the appellee and other persons, parties defendant, and as to the appellee and all the other defendants except the mortgagors, it alleged that they had, or claimed to have, some interest in the mortgaged premises, or some part thereof, as purchasers, mortgagees or otherwise, which interests, if any, had "accrued subsequent to the lien of the said mortgage of your orator, and are subject thereto."

The appellee made no answer to said bill, and a decree *pro confesso* was rendered as to her. A sale followed, at which appellant, Foval, became the purchaser, and he subsequently obtained a master's deed for the premises.

The question is, whether that proceeding is a bar to the rights of appellee.

She held the prior mortgage, and when the bill to foreclose the Arnold mortgage was filed, and when the decree in that case was rendered, her debt was not due.

She was not a necessary party in that case, nor indeed was she a proper party.

The only decree that could have been rendered if the question had been raised as to her rights, would have been to sell subject to her incumbrance.

Had her claim been payable, the entire estate might have been sold with her consent, and the proceeds divided according to the priority of the respective incumbrances. In that case she would have been a proper party.

When the prior mortgagee is made a party to a foreclosure suit by a second mortgagee, there should be a distinct allegation of the purpose for which he is brought in, and if

it is intended to assert the invalidity of the first mortgage, or that for any reason it should be subordinated to the second, there should be an averment of the facts relied on, so that an issue thereon may be made up by the pleadings. Under the general allegation in the bill in this instance, the appellee was not bound to set up her prior incumbrance, and her rights in respect thereto were not affected by the decree. She was not barred by that proceeding and might proceed to foreclose when her mortgage became due. Jones on Mortgages, Sec. 1439 *et seq.*; Lewis v. Smith, 9 N. Y. 502; Straight v. Harris, 14 Wis. 509; Bd. Sup'rs v. M. P. R. R., 24 Wis. 93; Freeman on Judgments, Sec. 303.

The court properly ruled on this point.

A question is made also as to the correction of the description.

It is alleged that the proper description is lot No. 11, in the town of Brussels.

The description given is by metes and bounds. It does not seem to have been controverted by the pleadings that it was the intention to place the mortgage on said lot No. 11. There was a brick house on the property built by Stahl before the execution of the mortgage, and the appellee was in possession thereof at the time Foval acquired the Arnold mortgage and remained in such possession up to the time of the filing of the bill in this case. Foval had abundant notice of such possession and was necessarily affected thereby. Moreover the Arnold mortgage described the property by metes and bounds substantially the same as in the appellee's mortgage, and in the bill to foreclose that mortgage it was also averred that the description was incorrect, that it was intended to cover said lot No. 11, and prayed for a correction of the error.

The point now made by appellant in this respect must also be overruled.

It is further urged on behalf of appellant that the mortgage held by appellee was fraudulent in that it was given without consideration. The proof on this point is very clearly with appellee.

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It is not deemed necessary to discuss the evidence in detail.

After a careful consideration of it, we are satisfied with the conclusion reached by the Circuit Court that the debt which the mortgage was given to secure was *bona fide* and was unpaid.

No other objections are presented by the appellant. We are of opinion the decree is responsive to the equities of the parties and that it should be affirmed.

The People, etc., ex rel. John F. Clark, Clerk, etc., v.
The Village of Chapin.

48	643
77	139
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1. *Mandamus Proceedings*.—In mandamus proceedings the relator must show a clear legal right to the relief prayed.

2. *Municipal Corporations—Liability for Costs in Quasi Criminal Proceedings*.—Sec. 40, Ch. 53, R. S., providing that in all criminal cases where the fees can not be collected of the party convicted, or when the prosecution fails, the county may, in its discretion, direct that the costs of the prosecution, or so much thereof as shall seem just and equitable, shall be paid out of the county treasury, provided that the costs in criminal and *quasi* criminal prosecutions for the violation of ordinances of an incorporated town or city, when the provisions of the charters of such towns or cities do not prohibit the payment of such costs, may be paid by such city or town in the discretion of the city council or board of trustees of such incorporated cities or towns, applies to suits originally commenced in the Circuit Courts, as well as to those commenced before justices of the peace, and taken there by appeal.

3. *Municipal Corporations Not Liable for Costs*.—Where a city or town is suing to enforce its ordinances, it is performing a public function just as the State is when prosecuting by indictment or information; the payment of costs in such proceedings being discretionary, such city or town can not be compelled to do so by mandamus.

4. *Cities and Villages—Agents of the Legislature, etc.*—Cities and villages are mere agents of the legislature, for the purpose of enforcing local government, and are vested with the power of enacting and enforcing ordinances, and when suing to enforce them, are a public function, just as the State is, when prosecuting by indictment or information.

Memorandum.—Petition for mandamus. Appeal from a judgment for defendant rendered by the Circuit Court of Morgan County; the

Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, 1892, and affirmed. Opinion filed March 6, 1893.

STATEMENT OF THE CASE BY THE COURT.

This was a petition for mandamus addressed to the Circuit Court, as follows:

“The People of the State of Illinois ex rel. John F. Clark, clerk of the Circuit Court of Morgan County, State of Illinois, respectfully represents unto your honor that at the May term, A. D. 1890, of the Circuit Court of said county, there was a suit on the docket of said court, originally brought in said court, in an action for debt for selling liquor without license, numbered 29, entitled, “The Village of Chapin v. Patrick Murphy,” and the same came up for trial, and judgment was rendered for the defendant, and judgment was rendered by said court, in said cause, against the said plaintiff for the costs of said suit, as will appear by the record of the same.

That the costs of said suit were taxed as follows, to wit: Fees due the circuit clerk, \$42.55; fees due to the sheriff of Morgan County, \$223.90; and fees due witnesses in said cause, \$325.60; making a total of \$529.05, costs due and unpaid.

That these costs will appear charged up against said plaintiff in fee book number 23, at pages 174 and 175, of said clerk's office.

Your petitioner would further show unto your honor that the said village of Chapin has neglected and refused to pay said costs to the parties entitled thereto, though the same has frequently been demanded of the proper officers of said village, and that several notices to pay said costs have since been sent to the president and clerk of said village, calling their attention to said costs and demanding payment thereof, to which notices no attention has been paid by the officers of said village who gave notice that they refuse payment of the same, and your petitioner is without remedy in the premises to enforce the payment of said costs except by this petition for a mandamus.

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Wherefore, your petitioner prays your honor to grant a writ of mandamus under the seal of this court, directed to the said village of Chapin, commanding said village to pay said \$529.05, the costs due in said cause, to the clerk of this court, the same to be by him disbursed to the various parties entitled thereto, and commanding said village, if there be not sufficient funds in the treasury to meet this demand, to proceed at once to raise and collect a sufficient amount for that purpose by the legal means within its power, and for such other and further relief in the premises as to your honor shall seem meet, and that to justice and equity may appertain, and thus your petitioner will ever pray, etc.”

The court sustained a demurrer to the petition and entered judgment accordingly, from which an appeal has been prosecuted to this court.

APPELLANT'S BRIEF.

The petition, on its face, shows sufficient ground for the writ, and the court erred in sustaining a demurrer thereto. The demurrer was a general one, and was to the cause of action, as set out, and not to the form of the petition.

That this is the proper remedy, and that the petition contained all that was necessary, we cite *Cairo v. Everett*, 107 Ill. 75; *City of Ottawa v. The People*, 48 Ill. 234; *City of Olney v. Harvey*, 50 Ill. 453; *Peoria County v. Gordon*, 82 Ill. 435.

CHAS. A. BARNES, attorney for appellant.

APPELLEE'S BRIEF.

The appellant has invoked the power of the State in a case in which he has no rights, except it clearly appears from the records and pleadings in the case. *People v. C. & A. R. R.*, 55 Ill. 95; *People v. Glann*, 70 Ill. 232; *People v. Lieb*, 85 Ill. 484; *People v. Crotty*, 93 Ill. 180; *People v. Dulaney*, 96 Ill. 503; *Comm'rs of Highways, etc., v. People*, 99 Ill. 587; *People v. Johnson*, 100 Ill. 537; *Village of Hyde Park v. Thatcher*, 13 Brad. 613.

In the case last cited, it is held petitioner must show a clear right to have the act done, and in addition, that the corporation has the power to do the act, and that it is its duty to do the act in the manner sought.

The judgment for costs as appears from the record was, no doubt, entered by the clerk *pro forma* and without any order from the judge. But be that as it may, in the case at bar the court was asked to issue a *mandamus* compelling the town board to do an act that the statutes expressly provide shall be discretionary with them. This a court will never do. *County of St. Clair v. People*, 85 Ill. 396.

MORRISON & WHITLOCK, attorneys for appellee. \

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

It is provided by the latter clause of Sec. 40, Ch. 53, R. S., that "in all criminal cases, where the fees can not be collected of the party convicted, or where the prosecution fails, the county board may, in its discretion, direct that the cost of the prosecution, or so much thereof as shall seem just and equitable, shall be paid out of the county treasury, provided that the costs in criminal and *quasi* criminal prosecutions for the violation of an ordinance of an incorporated city or town, where the provisions of the charters of such towns or cities do not prohibit the payment of such costs, may be paid by such city or town, in the discretion of the city council or board of trustees of such incorporated cities or towns."

It is suggested this provision is not valid, because the subject-matter thereof is not embraced in the title of the act. No argument is presented in support of the suggestion. If there were really a question as to the constitutionality of the enactment, we should dismiss the appeal for want of jurisdiction.

As was said in *St. Louis Transfer Co. v. Canty*, 103 Ill. 423, there must be something more than the mere suggestion that a constitutional question is involved.

It must appear that there is substantial ground for such

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a question; otherwise, every case which depends upon the statutes might be dismissed from this court upon such suggestion. So also of the suggestion that Section 40 has been impliedly repealed by the latter expression of the legislative will, in Secs. 8 and 17, Ch. 33. These sections were in the Revised Statutes of 1845, Secs. 4 and 14, Ch. 26, and were merely re-enacted in the revision of 1874. They clearly do not repeal directly, or by implication, the provisions of said Sec. 40, but all these are to be considered and construed together.

In *Town of Nokomis v. Harkey*, 31 Ill. App. 107, it was held that in a prosecution under the town ordinance, begun before a justice of the peace, and removed, by appeal, to the Circuit Court, the town was not liable for cost.

While the section referred to relates wholly to the fees of justices of the peace and police magistrates, so far as it fixes a scale of charges, yet it also contains a provision as to the fees of constables, jurors and witnesses in criminal cases, and then follows the clause above quoted. Counsel insist that this clause with its proviso relates only to proceedings before justices of the peace, or originating there and removed by appeal to courts of record, and that it can not be applied to original suits brought in courts of record. It is also urged that by the statute relating to costs, as the same is to be construed under Div. 5, Sec. 1, Ch. 131, a municipality suing to recover for a violation of its ordinances should be held for costs the same as any other plaintiff who may fail to recover. And it is argued that, while by section 17 of the costs act, the people, the governor and the county are exempt from liability for cost, there is no such exemption provided for municipal corporations when seeking to enforce their ordinances.

Laws are to be construed according to their spirit, and not always according to their mere letter. The taxation of costs and recovery therefor depend upon the statute.

It is, of course, conceded that the sovereign power is not chargeable with costs, or liable to advance costs in order to obtain writs and service thereof. The city or town is a

mere agency of the legislature for the purpose of enforcing local government, and is invested with power to enact and enforce ordinances on a great variety of subjects, thereby relieving the State from considerable burdens in respect to such matters. When the city or town is suing to enforce its ordinance, it is performing a public function just as the State is when prosecuting by indictment or information.

Now, considering all the sections referred to, and the nature of the prosecution by a city or town, it is, to say the least, a matter of grave doubt whether it was intended by section 40 to provide only for cases arising before justices of the peace.

The spirit and policy of the law would seem to include all "criminal and *quasi* criminal prosecutions for the violation of ordinances," as well those originally brought in courts of record, as those originating in the lower courts.

Again, the petition seeks to require the village to pay to the relator all the costs of the case.

While he has no interest in any except as to the amount due for his fees, he asks that the amount due the sheriff and the witnesses be also paid to him. He has no right to ask that anything beyond his fees should be paid to him. The village, if bound to pay, would certainly have the right to pay directly to parties to whom the money belongs.

The rule is familiar that in mandamus proceedings the relator must show a clear legal right to the relief prayed.

We are inclined to think the demurrer to the petition was properly sustained, and the judgment of the Circuit Court will therefore be affirmed.

State National Bank v. Butler, Surviving Partner, etc.

1. *Partnership—When it Exists.—Sharing of Losses and Profits.*—The fact of sharing of losses and profits, spoken of in the books, is an important, if not a controlling, test in determining whether a partnership exists; but it is not infallible; it is subject to qualifications. (1) It must be a shar-

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ing in the profits, as distinguished from merely making the profits the measure of compensation for services, or for the use of property, or money in the business. (2) There must not only be a sharing in the profits, but it must be done as a principal, and not merely as an employe, or as interest on a loan of money or for the use of property.

2. *Partnership—Existence of, etc.--Losses and Profits.*—The principle to be collected from the authorities appears to be that a partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating or being interested in the profits of a business, but that the existence of a partnership implies also the existence of such a relation between the parties, as that each of them is a principal, and each an agent of the other.

Memorandum.—Action against surviving partner. Appeal from judgment for the defendant, rendered by the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

APPELLANT'S BRIEF.

In the leading work on the subject of partnership these propositions are stated: "Tenants in common, or joint tenants of a mine or quarry, may or may not be partners, and the mine or quarry itself may or may not be a part of the common stock. But it is highly inconvenient, if not altogether impossible, for co-owners of a mine or quarry to work it themselves without becoming partners, at least in the profits of the mine; and persons who work a mine or quarry in common are regarded rather as partners in trade than as mere tenants in common of land. The co-owners of mines may be partners, not only in the profits, but also in the mine itself. The co-owners are then partners to all intents and purposes and their mutual rights and obligations are determined by the law of partnership as distinct from the law of co-ownership." 1 Lindley on Partnership, 55; Fougner v. Bank, 30 N. E. Rep. 442. See also Winds v. Davenport (N. J.), 7 Atl. Rep. 295; Morse v. Richmond, 97 Ill. 303; Meehan v. Valentine, 145 U. S. 622; Phillips v. Nash, 47 Ga. 227; Gardt v. Brown, 113 Ill. 480; Fougner v. Bank, 30 N. E. Rep. 442; 17 Am. & Eng. Enc. Law, 829.

"Where a party of mature years and sound mind, being

able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself as to the nature of its contents, he will, nevertheless, be bound; for in such case the law will not permit him to allege, as a matter of defense, his ignorance of that which it was his duty to know, particularly where the means of information are within his immediate reach, and he neglects to avail himself of them." *Black v. Railway Co.*, 111 Ill. 358.

JOHN MAYO PALMER and CONNOLLY & MATHER, attorneys for appellant.

APPELLEE'S BRIEF.

The law giving effect to the intention of the parties, the instrument, if valid at all, must be construed and held as a pledge.

"In determining this question, the intention of the parties must be considered. Written articles of co-partnership may be so expressive as to leave no room for doubt. So far as these articles of agreement are concerned, we discover nothing in them evidencing an intention to form a partnership." *Smith v. Knight*, 71 Ill. 150; *Butler v. Merrick*, 24 Ill. App. 628.

The parties to the instrument having treated it as importing a purpose different from a partnership, the law will not allow it to be construed as meaning a partnership. *Lunn v. Gage*, 37 Ill. 19; *Garrison v. Nute*, 87 Ill. 215; *Church v. Brose*, 104 Ill. 206; *People v. Murphy*, 119 Ill. 159.

Whatever puts a party upon inquiry, amounts, in judgment of law, to notice of all facts which might be learned by due and diligent prosecution of the inquiry. *Ins. Co. v. Ford*, 89 Ill. 252; *Lumbard v. Abbey*, 73 Ill. 178; *R. R. Co. v. Kennedy*, 70 Ill. 250; *Shepardson v. Stevens*, 71 Ill. 646; *Russell v. Ranson*, 76 Ill. 167.

It is denied that the division of the profits and losses of a business between the parties to it necessarily constitutes them partners. Again, such division is incident to the joint

adventures of tenants in common as well as to the adventures of persons as partners. Niehoff v. Dudley, 40 Ill. 406; Dwinel v. Stone, 30 Me. 384; Donnell v. Harshe, 67 Mo. 170; Rice v. Austin, 17 Mass. 197; McGregor v. Parsons, 41 Ill. App. 571; Donnan v. Gross, 3 Brad. 409; Smith v. Knight, 71 Ill. 148; Parker v. Fergus, 43 Ill. 437; Hefner v. Palmer, 67 Ill. 161, Am. & Eng. Enc., Vol. 17, p. 882.

“A contract for partnership, perhaps more than any other, must be entered into deliberately, understandingly, fairly, and without deception, or undue or wrongful influence.” Hynes v. Stewart, 10 B. Mon. (Ky.) 429; Howell v. Harvey, 5 Ark. 270; Fogg v. Johnston, 27 Ala. 432; Parsons on Part., 13.

This suit is against appellant as surviving *partner*, etc., and a recovery can only be had upon and according to the allegation. Tenants in common, though acting jointly with respect to the subject-matter of ownership, are not partners, and proof of such joint action is not sufficient to establish a partnership, or to sustain this action. Dwinel v. Stone, 30 Me. 384.

A joint interest and enterprise do not necessarily constitute a partnership. Morton v. Gateley, 1 Scam. 211; Blue v. Leathers, 15 Ill. 31.

Finally, it is insisted, in view of all the facts in evidence leading to, attending and following the execution of the instrument, that it is absolutely void for fraud. Kenner v. Harding, 85 Ill. 264; Witherwax v. Riddle, 121 Ill. 140.

J. A. McCLEARNAND and GROSS & BROADWELL, attorneys for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

Appellant brought suit against the appellee, as the surviving partner of Speed Butler, deceased. The written agreement between the parties, which appellant insisted created a partnership, was before us in the case of Butler v. Merrick, 24 Ill. App. 628.

We there held that as between the parties to it the in-

strument did not create a partnership, and that there was nothing in the facts to justify the conclusion that third persons might treat them as partners. In that case, the plaintiff did not know of the existence of this writing.

In this case, the plaintiff did know of it, and reaching the conclusion that it sustained the statement previously made by Speed Butler, that the appellee was his partner, advanced money on the note in evidence, signed Speed Butler & Co.

We have carefully read the very able and ingenious argument of counsel for the bank, urging us to reconsider the conclusion reached in the Merrick case.

After a thorough re-examination, we are entirely satisfied with that conclusion, and we see no occasion to recede from it. The question now is, whether the appellee can be held as a partner by the bank, on the facts as disclosed in this case. The same proof is here that was in the Merrick case, as to the manner of the execution of the instrument, the object of it as understood by appellee, and her misunderstanding as to its contents. It appears that Speed Butler kept his account with the appellant bank, and desiring to borrow money there, represented to the cashier that the appellee was his partner in the business, that the agreement was recorded, and the cashier, while the matter was under consideration, took occasion to examine the record, thus ascertaining the terms of the agreement.

Was he justified in the conclusion that it created a partnership?

The primary object of the agreement was to transfer a one-fourth interest in certain coal mining property from Speed Butler, as trustee, to the appellee, as trustee, for the stated price of \$13,000, subject to certain conditions and limitations, among which were, that a royalty of one quarter of a cent per bushel on all coal taken from the mines was to be paid to Speed Butler, who was to have the "entire management and control of all matters in connection with the mine," and in case of his death, his executors, administrators or trustees were to have the same authority; that he should have the right to buy back the interest sold at whatever price

might be offered by any *bona fide* purchaser, and that no sale should be made by appellee to any party that might be objectionable to him, and that he would watch and protect the interest of appellee, in the same manner as though it belonged to himself. It was also provided, that at the end of each month, a full and satisfactory statement should be made, and the profits and losses shared in proportion to the interests, one-fourth to appellee, and three-fourths for Speed Butler.

It is this provision for sharing losses and profits that is relied upon as establishing the partnership relation. This is often spoken of in the books as an important, if not a controlling test, but it is not infallible. There are certain qualifications. In the case of *Fougner v. First Nat. Bank*, 141 Ill. 124, cited by counsel for appellant, the court, speaking of this test, remarks as follows:

“That, however, is subject to the qualification that it must be a sharing in the profits as distinguished from merely making the profits the measure of compensation for services, or for the use of property or money in the business.

“The test of receiving profits is also subject to the further qualification that there must not only be a sharing in the profits, but it must be done as a principal and not merely as an employe, or as interest on a loan of money, or for the use of property. This last qualification is founded on the case of *Cox v. Hickman*, 8 H. L. 268.

“In *Holman v. Hammond*, L. R. 7 Exch. 218, it is said the import of opinions delivered in the House of Lords in that case is correctly summarized by O’Brien, J., in *Shaw v. Galt*, 16 C. L. 375, thus: The principle to be collected from them appears to be that a partnership existing even as to third parties is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business, but that the existence of such partnership implies also the existence of such a relation between such persons as that each of them is a principal and each an agent of the other.”

Then follows a quotation to the same effect from the opin-

ion of Lord Cranworth, in *Cox v. Hickman*, in which he says: "But the real ground of liability is that the trade had been carried on by persons acting in his behalf. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf; *i. e.*, that he stood in the relation of principal toward the persons acting ostensibly as traders, by whom the liabilities have been incurred and under whose management the profits have been made." The court add :

"In the application of this rule many decisions are to be found by courts of last resort in this country, to the effect that, notwithstanding a party may contract to receive a part of the profits of a business, he can not be held liable as a partner. On the other hand, many others—sometimes by the same courts—hold the contrary. These cases are all reconcilable on the distinction that in the first class of cases there was a mere hiring of services, property or money to be paid for out of the profits of the business in which it was engaged, while in the latter there was a proprietary interest in the business. In other words the distinction drawn by Judge O'Brien, *supra*, will, as a rule, sufficiently harmonize all the cases to which our attention has been called."

Reference is then made approvingly to *Smith v. Knight*, 71 Ill. 148, based on former decisions, holding that no partnership was created by a contract to receive a part of the profits of a business for the use of money advanced to enable the firm to which it was furnished to carry on its business, and then it is said that the circumstances which most clearly distinguished the agreement in the case then in hand from those which had been held to create only the relation of employer and employe, debtor and creditor, or the mere hiring of property to be used in business, was the clause giving Ferguson (whose denial of the partnership relation raised the issue in the case), "general charge of the office, finances, books, correspondence, accounts, sales, or other matters

connected with the business." Other expressions in the agreement are referred to as tending to support the partnership theory.

We have quoted thus from this opinion because it seems to be greatly relied on by appellant as sustaining the contention that the agreement now under consideration, *ex vi termini*, created a partnership.

As it is above expressed, the existence of a partnership implies such a relation between the persons as that each of them is a principal and each an agent for the other. In the present case a casual reading of the agreement would show that there was no such relation intended between these parties.

First, they are described as trustees, which negatives the idea; next, the entire management is to be in the hands of one of the parties, to the exclusion of the other, who can not interfere in any way, or dispose of any of the supposed partnership effects; and still further, this management is to pass, in case of death, to his personal representatives, which also negatives a central doctrine of the law of partnership.

Further, the agreement gives him a right to buy back, in preference to any other purchaser, and he stipulated to care for the interest as his own.

Still further, there is no provision requiring appellee to furnish money to carry on the business.

It was impossible to conduct the operations in view without considerable capital. This agreement relates only to the mining property which could not be utilized without money to pay for labor, supplies, freights, etc.

Another significant fact was, that Mr. Butler was to receive a royalty of one-fourth of a cent per bushel on all coal taken from the mine; not on three-fourths merely, but on all; "to be paid before anything else is to be paid, from the proceeds of the mine."

Trained business men, as these bank officers no doubt were, would hardly be justified in supposing that by this agreement the appellee intended to make Speed Butler her agent, and to authorize him to pledge her credit to any extent the business of mining and selling coal might require.

A very natural suggestion would have been that some purpose other than that of a partnership, was in the minds of the parties, and the question would have been what that purpose was. Was it not probably to secure the appellee for money advanced by her and which Speed Butler needed to carry on the business?

To say the very least, a cautious man would have felt that here was a most unusual state of things for a partnership, involving very unequal conditions and hazards for the parties; that it was doubtful whether such was the intention, and that prudence required further investigation. The appellee was well known to the president and cashier and resided but a few blocks from the bank. They saw her frequently and might easily have made inquiry of her as to her understanding of the matter. If the contract was free and clear from all doubt and if it plainly made the signers partners, such inquiry would of course have been unnecessary.

We can not so regard it, and are of the opinion that when attentively considered it fairly excludes the idea of partnership in the legal sense.

But if it is merely ambiguous and uncertain then the bank was put upon inquiry and must be charged with knowledge of all the facts such inquiry would have developed.

The case was tried by the court, a jury being waived, and it is suggested in the brief of appellant that certain propositions of law asked on behalf of appellant should have been held. No argument is presented in support of the suggestion and we would therefore be justified in declining to examine the propositions. The first asserts that the contract was duly executed. This, as between the parties thereto, would depend on whether the appellee understood the contents and import of the instrument and understandingly signed it, which involves a question of fact, and assumes a certain conclusion to be drawn from the proof.

The second assumes that the parties were *to jointly operate the mines*, and the third, that Speed Butler was to manage the business for himself and *for the appellee*, which, though

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true in a certain sense, was not necessarily so, as we have attempted to show, in the only sense that is important to support the appellant's theory, that is, the sense of a partnership.

The fourth and fifth clauses assume that by the terms of the instrument a partnership was created, or if they do not so assume they are without force or point.

It is not suggested that the court erred in holding propositions of law asked on behalf of the appellee.

We are of opinion that the judgment is in accordance with the merits of the controversy and that it should be affirmed.

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Scott v. Bibo et al., Partners as Bibo & Co.

1. *Alteration of Instruments—Adoption, etc.*—It was conceded that a promissory note had been altered, but it was shown that the maker, upon an examination of the note in the hands of the plaintiff, while claiming that it had been altered, unconditionally promised to pay it; *held*, that this was an adoption of the note as it then appeared, and by which the maker was bound.

Memorandum.—Action on promissory notes. Appeal from a judgment for plaintiff, rendered by the Circuit Court of Edgar County; the Hon. FRANCIS M. WRIGHT, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and affirmed. Opinion filed March 6, 1893.

APPELLANT'S STATEMENT OF THE CASE.

Assumpsit, brought upon two promissory notes executed by Josephus Scott, the appellant, at Chrisman, Illinois, on the 8th day of September, 1891, for the sums of \$5,000 and \$1,650, respectively, due on or before six months after date, and payable to the order of Standiford Brothers, bankers, of Chrisman. Soon after the execution of the notes Standiford Brothers assigned them to Bibo & Co., the appellees; after which the Standiford Brothers failed and left the country.

The defense is that the notes were materially altered by Standiford Brothers without the consent of appellant; by reason thereof, appellant is discharged from all liability thereon.

APPELLANT'S BRIEF.

A contract declared upon should be correctly stated. If the evidence differs from the statement, it is a variance that requires it to be rejected, and the party must fail in sustaining his allegation. *Crittenden v. French*, 21 Ill. 598.

Whether an alteration of an instrument is material is a question of law for the court, and should not be submitted to the jury. *Milliken v. Marlin et al.*, 66 Ill. 13. The law does not permit the payee of a note to change its terms and conditions without the assent of the maker, even if the alteration is in his favor, or to correct a mistake. *Brown v. Straw*, 29 Am. Rep. 369; *Lamb v. Paine*, 26 Am. Rep. 163; *State Savings Bank v. Shaffer*, 31 Am. Rep. 394. The notes sued on never become operative as a promise on the part of appellant. *Portage Company Branch Bank v. Lane*, 8 O. S. 406.

On the production of an instrument in court, if it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. *Gillett v. Sweat*, 1 Gil. 475; *Walters v. Short*, 5 Gil. 252; *Hodge v. Gilman et al.*, 20 Ill. 437; *Montag v. Linn*, 23 Ill. 551.

ROBERT L. MCKINLAY, attorney for appellant.

APPELLEES' BRIEF.

Where the maker of a note, after full knowledge of an alteration of the same, distinctly and unconditionally promises to pay it, he adopts the note as his own and will be bound to pay it. *Goodspeed v. Cutler*, 75 Ill. 534, 2 Pars. No. 565, 566.

H. S. TANNER, JOSEPH E. DYAS and H. VAN SELLAR, attorneys for appellees.

Ransom v. Duckett.

OPINION OF THE COURT, *the Hon. George W. Pleasants, Judge.*

Assumpsit on two promissory notes of appellant for \$5,000 and \$1,650, respectively, dated September 8, 1891, payable six months from date, to the order of Standiford Brothers, and by them assigned to appellees for value, and before maturity, being two of the notes involved in the case of Scott v. Gilkey, decided at this term. They purported to bear interest at five per cent "after due," and the defense on the merits was, that when delivered by appellant they bore interest "from date," and that afterward, and without his knowledge or consent, the change was made from date to due. The technical objection of a variance in description of the notes as declared on and produced in evidence from those really made and delivered, was also urged.

Aside from the questions whether they were in fact altered, and whether the alteration, if made, was material, we think it was proved by a preponderance of the evidence that defendant, upon examination of the notes in the hands of plaintiffs, while claiming that they had been altered, unconditionally promised to pay them. This was an adoption of the notes as they then appeared, by which he was thenceforth bound. The case of Goodspeed v. Cutler, 75 Ill. 534, is so like this as to be conclusive, and the judgment on the verdict for plaintiff will therefore be affirmed.

Ransom v. Duckett.

1. *Agency—Proof of its Existence—Ratification.*—The existence of an agency can not be proved by the admissions and statements of the supposed agent, when not made while engaged in performing the business of the agency, nor can a ratification by the principal of the acts of an agent, be established by the declaration of the agent.

2. *Agency—Its Existence and Ratification.—Admission of an Agent, etc.*—An admission of a principal as to the authority of a person to act for him as his agent, or that he ratified or adopted the acts of such per-

son, is competent to be shown in evidence against the principal but: the declarations of the alleged agent, to be admissible in evidence against the principal, must have been made while he was engaged in transacting and performing the business of the agency, as a verbal act of the agency itself.

Memorandum.—Action for damages. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892, and reversed. Opinion filed March 6, 1893.

The opinion of the court states the case.

APPELLANT'S BRIEF.

When one of two innocent parties must suffer loss, the one whose negligence caused the loss must suffer. This doctrine has often been adjudicated by the courts of this and other States. Touching the fact that Duckett, in dealing with Brownlow, dealt at his peril, see *Payne v. Potter*, 9 Iowa, 549; *Beach v. Vandewater*, 1 Sandf. (N. Y.) 235; *Hunt v. Chapin*, 6 Lans. (N. Y.) 139; *Morris v. Watson*, 15 Minn. 212; *Baxter v. Lamont*, 60 Ill. 237; *Peabody v. Hoard*, 46 Ill. 242; *Cooley v. Willard et al.*, 34 Ill. 68.

MORRISON & WHITLOCK, attorneys for appellant.

CHAS. A. BARNES and OWEN P. THOMPSON, attorneys for appellee.

OPINION OF THE COURT, *the Hon. Carroll C. Boggs, Judge.*

This is an appeal from a judgment against the appellant upon the verdict of a jury in the sum of \$250 damages, said to have been occasioned by his refusal to accept and pay for a certain lot of cattle, alleged to have been sold by the appellee to him.

It is conceded that the damages awarded were excessive under the evidence, and the appellee, in this court, entered a *remittitur* of \$79, for the purpose of curing the error in that respect. The appellant denies that he made the alleged contract.

It is not contended that he personally contracted for the

Ransom v. Duckett.

cattle, but that one Brownlow was authorized to, and did, buy them as his agent. The appellant testified, upon the trial, that Brownlow had no authority to buy the cattle for him, and Brownlow testified to the same effect.

The appellee sought to establish the agency of Brownlow by proof of facts and circumstances from which it is insisted a general agency to buy cattle ought to be implied. There had been no previous dealing between the appellee and appellant through the medium of the alleged agent, and it is not claimed that anything occurred between the parties hereto, in the course of the transaction in question, connecting the appellant with it. It is clear that Brownlow contracted for the cattle, but not clear that he assumed to do the buying for the appellant, or that the appellee understood, at the time the contract was made, that the appellant was the purchaser. Brownlow was authorized to buy hogs for the appellant, and at the time of the alleged purchase of the cattle, did buy some hogs in that capacity from the appellee, which the appellant accepted and paid for.

That Brownlow bought a lot of cattle from one Smith on one occasion, and a bull from one Wallace on another for appellant, was all that was proven in support of the existence of an alleged general agency of Brownlow to buy cattle for him.

Brownlow and the appellant both testified that these purchases were made by special direction and authority given in each instance to do so.

The appellee, over the objections of the appellant, was permitted by the court to testify that Brownlow, in a conversation between them some time after the alleged sale of the cattle, told him (the appellee) that he (Brownlow) wrote to the appellant "that he had bought the appellee's cattle," and that the appellant told him (Brownlow) "that the price paid for the cattle was too high and not to buy any more at that price." All will recognize the value and importance of such evidence to the appellee and its damaging effect to the defense of the case.

It amounted to an admission of the authority of Brownlow to buy the cattle and moreover a ratification of the purchase.

If not competent it was clearly so prejudicial to the appellant as to demand a reversal. We think it was incompetent. Why should a conversation between the appellee and Brownlow go to the jury as evidence against Ransom? Manifestly only because of the legal identity of principal and agent. But here the agency was denied, and the existence of that relation was the chief matter at issue. The purpose and intent of this evidence was to prove that Brownlow had authority to act for Ransom to prove the agency.

The existence of an agency can not be proved by the mere admissions and statements of the supposed agent when not engaged in performing the business of the agency. *Proctor v. Tows et al.*, 115 Ill. 138.

Nor could a ratification by Ransom of the acts of Brownlow be established by the declarations of Brownlow. This conversation between Brownlow and the appellee was, as to Ransom, mere hearsay.

An admission of Ransom as to the authority of Brownlow to act for him, or that he ratified and adopted the act of Brownlow, is competent to be proven in evidence against him; but the declarations of Brownlow, to be admissible in evidence against Ransom, must have been made while he was engaged in transacting and performing the business of the agency as a verbal act of agency. 1 *Greenleaf on Evidence*, Sec. 113; *C., E. & Q. R. R. Co. v. Lee*, 60 Ill. 501.

The full effect of this improper testimony upon the minds of the jury can not be known. Its detrimental influence can not be doubted, and it may have operated to determine the issue against the appellant.

The judgment must therefore be reversed and the cause remanded.

The City of Petersburg v. Whitnack.

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1. *Judgment for Costs Against a Municipal Corporation.*—It is error to render a judgment against a municipal corporation for costs.

2. *Instructions—Intention of a Person Who Violates an Ordinance.*—In an action by a municipal corporation for the violation of an ordinance against knowingly suffering or permitting domestic animals to graze on the public streets, the court modified an instruction asked by the plaintiff, so as to make it necessary to show that the defendant intentionally permitted his horse to graze on the street and gave an instruction to the same effect for the defendant. *It was held* error, as no positive or preconceived intention is necessary. A mere incidental and trifling act of grazing would not be sufficient, as if a horse were to snatch a mouthful of grass when led along the street. There must be something substantial, but it is not necessary to show a design or intention.

Memorandum.—Suit for violation of an ordinance. Appeal from a judgment for the defendant, and against the appellant, for costs, rendered by the Circuit Court of Menard County; the Hon. CYRUS EPLER, Circuit Judge, presiding. Heard in this court at the November term, A. D. 1892. Opinion filed March 6, 1893.

APPELLANT'S STATEMENT OF THE CASE.

This is a proceeding by the city of Petersburg against the appellee, to recover the penalties for violations of a certain ordinance, which declares it unlawful for any horse, or other domestic animal, to go at large in said city, and prescribing a penalty against the owner or possessor of any such animal, who shall knowingly suffer or permit any such animal to go at large, or who shall in any way permit any such animal to graze on any of the streets or alleys of said city.

A trial by jury was had in the Circuit Court; the jury rendered a verdict in favor of appellee, and the court overruled appellant's motion to set aside the verdict, and for a new trial, and rendered judgment against the city for the costs of suit, and awarded execution therefor against the city.

APPELLANT'S BRIEF.

Upon the dismissal of a prosecution under an ordinance,

or the acquittal of the defendant, it is error to render judgment against a municipal corporation for costs. *Town of Nokomis v. Harkey*, 31 App. Ct. 107.

It is error, in rendering a judgment against a municipal corporation, to award an execution. And this rule applies with full force where an execution for costs is awarded. *City of Kinmundy v. Mahan*, 72 Ill. 462; *Town of Odell v. Schroeder*, 58 Ill. 353; *City of Chicago v. Halsey*, 25 Ill. 595; *City of Bloomington v. Brokaw*, 77 Ill. 194; *Village of Kansas v. Juntgen*, 84 Ill. 360; *City of Paris v. Cracraft*, 85 Ill. 294; *City of Macomb v. Twaddle*, 4 Bradw. 254.

F. E. BLANE and N. W. BRANSON, attorneys for appellant.

GEO. B. WATKINS, attorney for appellee.

OPINION OF THE COURT, *the Hon. George W. Wall, Judge.*

This was a proceeding begun before a police magistrate by appellant against appellee, on complaint for a violation of an ordinance of the city, which made it unlawful for domestic animals named to run at large, and declared the herding or staking out of any such animal, or in any way permitting such animal, whether in charge of any person or not, to graze on any of the streets or alleys of said city, to be a violation of the ordinance.

The case was removed by appeal to the Circuit Court, where a trial by jury resulted in a verdict for the appellee, and judgment was rendered against the city for cost and execution was awarded therefor.

It was error to render judgment against the city for costs. *Town of Nokomis v. Harkey*, 31 App. Rep. 107.

It was error to award execution against the city. *City of Chicago v. Halsey*, 25 Ill. 595; *City of Kinmundy v. Mahan*, 72 Ill. 462; *City of Bloomington v. Brokaw*, 77 Ill. 194; *Village of Kansas v. Juntgen*, 84 Ill. 360.

The court modified one of the instructions asked by the city so as to make it necessary to show that the defendant intentionally permitted his horse to graze on the street, and gave an instruction to the same effect asked by defendant.

City of Petersburg v. Whitnack.

In view of the evidence, which we have read with care, we are inclined to think the use of the word "intentionally" was calculated to mislead the jury. The ordinance is violated when grazing on the street is permitted. No positive or preconceived intention is necessary. Nor would a mere incidental and trifling act of grazing be sufficient, as if a horse were to snatch a mouthful of grass when led along the street. There must be something substantial and it must be permitted, but it is not necessary to show design or intention; permission is enough. As the case must be again tried, we have thought it necessary to refer to this point, though we do not care to discuss the evidence. The conduct of the juror Levering was quite reprehensible, and according to the authority of *Jewsbury v. Sperry*, 85 Ill. 56, was sufficient to require a new trial.

The judgment will be reversed and the cause remanded.

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ABSTRACT OF THE RECORD.

An abstract prepared without regard to the rules of the court, consisting largely of mere conclusions of counsel as to the substance and effect of the testimony of the different witnesses, interspersed with arguments as to its weight, and confidential side remarks, is improper. For instance, the testimony of a witness covering eight pages of the bill of exceptions, is abstracted as follows: "It is not very material, except to show that Folger (the plaintiff in error) acted in good faith, and that he paid the costs and damages relative to a cow replevied." *Folger v. Bishop*, 526

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ACTION FOR INJURIES.

Previous Accidents—Evidence of, When Competent.—Where, upon the trial of an action for personal injuries resulting from the defective construction of a public fountain, evidence of other accidents, without proof that the fountain was in the same condition as when the injuries complained of were received, was admitted, upon assigning the same for error, *it was held*, that if the evidence of previous accidents was admitted as tending to show that the condition of the fountain was dangerous, it would be necessary to show that the condition of the fountain at the time of such accident was substantially the same as when the accident in question occurred; but if it was admitted for the purpose of showing that the city had notice of the defective construction of the fountain, then somewhat different constructions were involved. From the fact that accidents frequently occurred, the city would be presumed to know that this was dangerous, and was called upon to obviate the difficulty and remove the cause of the trouble; and if an effort were made in that direction, it would be a question of fact for the jury, under proper instructions, as to how much diligence was shown, and what was thereby accomplished. *City of Bloomington v. Legg*, 459

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Its Existence and Ratification—Admission of an Agent, etc.—An admission of a principal as to the authority of a person to act for him as his agent, or that he ratified or adopted the acts of such person, is competent to be shown in evidence against the principal; but the declarations of the alleged agent, to be admissible in evidence against the principal, must have been made while he was engaged in transacting and performing the business of the agency, as a verbal act of the agency itself. *Ransom v. Duckett*, 659

Presumption.—The presumption of agency arising from the fact that the defendant owned a house being remodeled, and had knowledge of the work which was done upon it, including that done by the plaintiff, and furnished a part of the money to pay for such remodeling, is a presumption of fact, and may be rebutted. *Shinn v. Matheny*, 135

Proof of its Existence—Ratification.—The existence of an agency can not be proved by the admissions and statements of the supposed agent, when not made while engaged in performing the business of the agency, nor can a ratification by the principal of the acts of an agent be established by the declaration of the agent. *Ransom v. Duckett*, 659

Special Agent.—An agent whose authority is confined to a single transaction is commonly denominated a special agent. The principal of such an agent is bound, only so far as his acts are strictly in accordance with the authority given him, and parties assuming to deal with his principal, through him, must, at their peril, ascertain the extent of his authority, and in controversies regarding it, be prepared to establish it by a preponderance of the evidence. *McAtee et al. v. Perrine*, 548

ALTERATION OF INSTRUMENTS.

Adoption, etc.—It was conceded that a promissory note had been altered, but it was shown that the maker, upon an examination of the note in the hands of the plaintiff, while claiming that it had been altered, unconditionally promised to pay it; *held*, that this was an adoption of the note as it then appeared, and by which the maker was bound. *Scott v. Bibb*, 657

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Owners of Animals Engaged in Common Undertaking, the Design of Which is to Obtain an Award.—Where the owners of ani-

ANIMALS. Continued.

imals are engaged in a common undertaking, the design of which is to secure a sum of money offered for a display of all the animals together, they will not be classed as strangers in the execution of the enterprise; privity with each other, and a direct promise to pay is not necessary to enable one to recover from another money received by him as his share of the premium money. *Dorsey v. Williams*, 386

ANOMALOUS PLEAS.

Anomalous pleas, or pleas not pure, rely upon matters stated in the record, and upon denials and negations of matters of fact contained therein, which, if true, constitute a sufficient defense against further proceedings in the suit. *Palmer v. Wood*, 630

APPEALS. *In Drainage Proceedings*, 17; *Taken by a Portion of the Parties*, 145; *Waiver of Judgment by Taking*, 202.

ARBITRATORS.

Misconduct.—Arbitrators duly chosen, having the matter in controversy under consideration, appointed a time and place to meet and hear evidence, etc., notified the parties, but did not themselves attend at said time and place. It appeared that on a day prior to the time set, one of the arbitrators, in the absence of the other, and in the absence also of the party interested, made a partial investigation of the matter, and reported what information he had obtained in conversations with some parties having knowledge of the matter, and his conclusions, to his co-arbitrator, upon which an award was rendered. In a suit to set aside the award *it was held* to be the imperative duty of the arbitrators to fix a time and place for a hearing, to give the parties notice thereof, and to hear them in the presence of each other and of all the arbitrators, and not having done so, the award was properly declared void and set aside. *Citizens Insurance Co. of Pittsburg v. Hamilton*, 593

Practice.—In acquiring information and knowledge upon which a conclusion is to be based, the arbitrators are required to act together. *Citizens Ins. Co. v. Hamilton*, 593

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

An instrument which, in terms, assumes to assign certain choses in action, mentioned therein, to a person, requiring him to convert the same into money, and to apply the proceeds to certain specified debts, including a debt due to such person, is an assignment for the benefit of creditors. *Leeper v. Greensfelder et al.*, 546

ASSIGNMENT OF ERROR.

An appellant can not assign for error, a matter affecting another, who was co-defendant in the court below, and as to whom the suit was dismissed and who did not appeal. *Lloyd v. Kelly*, 554

Abandonment.—Where an alleged error of the court in giving an instruction is assigned for error, but no specific objection to such instruction is made in the brief of the party complaining, nor any reference to such instruction, such assignment must be considered as waived or abandoned. *City of Mattoon v. Bowles*, 528

ASSIGNMENT OF ERROR. *Continued.*

By Parties Not Joining in an Appeal.—Where a party to a judgment did not join in an appeal, but afterward entered his appearance in the Appellate Court, and obtained leave to assign errors, the errors so assigned will be stricken from the record on motion of the appellees. *St. L. & P. R. R. Co. v. Kerr*, 496

Who May Assign.—Under section 70 of the Practice Act, where a judgment is rendered against two or more persons, either of said persons may remove the suit by appeal or writ of error to the Appellate Court, and for that purpose are permitted to use the names of all, if necessary; but no cost can be taxed against any person who does not join in the appeal or writ of error, the manifest object of this provision being to give each defendant the right to present any point affecting him, which he may desire the court to determine, whether his co-defendants are content with the judgment or not. Parties to the judgment who do not join in the appeal or writ of error, will not be allowed to enter their appearance in the Appellate Court for the purpose of assigning errors. *St. L. & P. R. R. Co. v. Kerr*, 496

ASSIGNMENT OF LEASES.

Attornment.—All leases, except leases at will, may be assigned if there be no restriction in the lease itself, and the assignee of the lease is granted, by Sec. 14, Chap. 80, R. S., the same remedies, by action or otherwise, for the non-performance of any agreement in the lease for the recovery of rent or other cause of forfeiture, as the lessor might have had while owner of the lease. Attornment is unnecessary to vest the assignee of a lease with the full rights of the assignor—the original lessor. *Howland v. White*, 236

ASSISTANCE. *Writ of*, 312.

ASSOCIATIONS. *Homestead and Loan—Withdrawal of Stock.*

ASSUMPSIT. *For Money Had and Received*, 74.

ATTORNMENT. *Assignment of Lease*, 237.

ATTACHMENT.

Garnishment and Interpleader—Non-resident Litigants—Rights of Domestic Creditors.—The plaintiff, a corporation, under the laws of Ohio, sued out an attachment from the Hancock County Circuit Court, against the defendants, who were residents of Iowa, and summoned a number of persons residing in Hancock County, as garnishees, who answered, admitting certain sums due, etc. J. F. Smith interpleaded, claiming the amounts due from the garnishees. A demurrer was overruled and judgment rendered upon the plea of interpleader. It appeared from the plea that the defendant, by instruments in writing, duly executed, acknowledged, delivered and recorded, according to the laws of Iowa, had, prior to suing out the attachment, for the purpose of securing certain creditors, transferred their property, including the debts garnished, to Mr. Smith, and that, before the writ issued, he had taken possession of the merchandise and books of accounts, and notified the garnished debtors of his rights in the premises. Upon appeal, *it was held* that the laws of

ATTACHMENT. *Continued.*

Iowa governed the transaction, so that, if legal there, it is legal in this State, unless the rights of domestic creditors are unfavorably affected. *Consolidated Tank Line Co. v. Collier et al.*, 529

ATTORNEYS. *Fees in an Action Against a Railroad*, 130; *Services in Injunction Suits*, 182.

ATTORNMEN.

Dispensed with.—The enactment of Sec. 14, Chap. 80, R. S. (Starr & Curtis, 1497), dispenses with the necessity of an attornment, and abrogates the rule announced in *Fisher v. Deering*, 60 Ill. 114. *Howland v. White*, 236

AWARDS. *Owner of Animals Contesting for*, 386.

BANKING.

Liability to Pay Checks of Parties Having no Funds on Deposit.—In a controversy over the liability of a bank to pay the check of a person having no funds on deposit, it is shown that the relations existing between, and the course of dealing pursued by the bank and the party drawing the check, were not merely such as pertain to the business of banking, but were sufficient to induce a person taking such check to accept it, believing that the bank was liable for its payment; the liability of the bank to pay the check becomes a question of fact for a jury to determine under all the facts and circumstances of the case. *Springfield Marine Bank v. Mitchell*, 486

Payment of Checks—Absence of Funds.—The mere fact that checks drawn upon a bank upon previous occasions, when the drawer had not funds on deposit, were paid, will not commit the bank to the payment of the party's checks indefinitely. *Springfield Marine Bk. v. Mitchell*, 486

BASTARDY. *Order of Commitment to Jail*, 109.

Judgment or Order in Bastardy—Commitment to Jail—Recitals.—Under the ninth section of the Bastardy Act, which provides that the defendant shall be committed to the county jail if he refuses or neglects to give the security, the imprisonment is a legal consequence of a failure to comply with the judgment. It is a means provided by law for the enforcement of the judgment, and does not depend upon a recitation in the judgment or order of the court that such means may be resorted to. *Livingston v. The People ex rel.*, 109

Judgment in Bastardy—Sufficiency.—A judgment has nothing to do with the means provided by law for its enforcement. An order for execution or other process or means of enforcement provided by law is not an integral part and need not be set out in a judgment. So a judgment in bastardy proceedings which did not order that the defendant be committed to jail if he failed to give the bond required by law, was held good nevertheless. *Livingston v. The People*, 109

Failure to Provide for Annual Payments.—The failure of a judgment in bastardy to direct to whom the annual payments should be made, does not invalidate the judgment. *Livingston v. The People*, 109

BOOKS OF ORIGINAL ENTRIES.

Ledgers.—It is error for the court to permit a party to offer in evidence, entries, and portions of books which are merely ledgers and not books of original entry, or to permit the bookkeepers of such party to testify as to other portions of said books, when they know nothing as to the truth of the entries, etc. *Meeth v. Rankin Brick Co.*, 602

Power of the Law Courts to require the Production of Books, etc.—The power of courts to require the production of papers, etc., should be used with circumspection. The statute requires "good and sufficient cause shown" as a prerequisite. Such cause should be shown by affidavit particularly pointing out the necessity and propriety of the desired order of the court requiring the production of such books, etc., so that the court can see that the applicant is really in need of the same to enable him to fairly present his cause of action or his defense, and that the application is for no improper or ulterior purpose. *Meeth v. Rankin Brick Co.*, 602

BURDEN OF PROOF.

When the right of a plaintiff to recover rests upon an alleged contract, he must show by a preponderance of the evidence, a right of recovery under all the terms and conditions of the contract. This is equally true whether the plaintiff is seeking to prove a condition necessary to his right of recovery, or endeavoring to exclude a condition, which his adversary asserts as a part of the contract. *McKenzie v. Stretch*, 410

In Agency, 135; *Railroad Accidents*, 274.

BY-LAWS. *Limitations in*, 185.

CARE AND DILIGENCE. *In Action for Personal Injuries*, 166; *Required of Persons with Defective Vision*, 166; *Exercised by Plaintiff*, 301.

CATTLE-GUARDS. *Failure of Railroads to Construct*, 36.

CERTIFICATE OF VILLAGE CLERK.

Sufficiency—Surplusage.—Where a village ordinance, contained in a printed book of ordinances purporting to be published by the order or authority of the village trustees, accompanied by the printed certificate, including the signature of the clerk, was admitted in evidence, it was held, that the certificate, including the name of the clerk, being in print, would be wholly insufficient if a certificate of the clerk was necessary. In this case being unnecessary, it was mere surplusage. *McGregor v. Village of Lovington*, 208

CHANCERY. *Question of Fact in*, 315.

CHARACTER.

In Action of Slander.—Where evidence of the plaintiff's character is competent in an action for slander it should be limited to the time of the alleged slander. *Sullivan v. Sullivan*, 435

CITIES AND VILLAGES.

Agents of the Legislature, etc.—Cities and villages are mere agents of the legislature for the purpose of enforcing local government, and

CITIES AND VILLAGES. *Continued.*

are vested with the power of enacting and enforcing ordinances, and when suing to enforce them, are a public function, just as the State is, when prosecuting by indictment or information. *The People v. Village of Chapin*, 643

Ordinances Void as against Public Policy, etc.—An ordinance providing that “No person, except peace officers, shall carry or wear under his or her clothing, or concealed about his or her person, any pistol, revolver, slung shot, knuckles, bowie knife, dirk, dagger or any other dangerous or deadly weapon, without the written permission of the president of the board of trustees of said village,” is invalid as against public policy, as well as being without authority of law, vesting, as it does, unlimited and arbitrary power in the president of the board of trustees to say who should and who should not carry concealed weapons, and that it is also invalid as not being in harmony with the enactment of the statute upon the same subject. *McGregor v. Village of Lovington*, 211

Ordinances Prohibiting Disorderly Conduct, 60.

Ordinances—Proof of.—Ordinances are proven *prima facie*, under the statute, when printed in book or pamphlet form, and published by authority of the village board. It is not necessary that a certificate of the clerk, written or printed, be appended to or accompany such book or pamphlet. It is sufficient if the book or pamphlet, on its title page or by printed certificate of the clerk, or otherwise on its face, purports to have been published by the authority of the trustees. *McGregor v. Village of Lovington*, 202

Publication of Ordinances by Authority, etc.—How Shown.—The fact that the book of ordinances was published by the authority of the village trustees may be shown by a printed statement to that effect itself. *McGregor v. Village of Lovington*, 208

Proof of Ordinances.—Certificate of Village Clerk.—Village ordinances may be proved by the production of a printed book of ordinances purporting to be published by the order or authority of the village trustees. *McGregor v. Village of Lovington*, 208

Depositing an Ordinance with the Clerk, Sufficient.—The depositing the ordinance with the clerk is in compliance with the statutory requirement, and sufficient, so far as the validity of the ordinance is concerned. It is immaterial whether it was filed or not. *McGregor v. Village of Lovington*, 202

Ordinances—Depositing with the Village Clerk—Filing, etc.—Under Sec. 46, Chap. 24, R. S., requiring all ordinances of cities and villages to be deposited in the office of the clerk before they become effective, the village of Lovington adopted an ordinance in terms requiring all ordinances of the village to be filed instead of deposited as required by the statute. *It was held* that a paper is, in legal effect, filed, when it is delivered to the proper officer and by him received to be kept on file. The deposit with the proper officer is the thing essential, of which the filing is but evidence. *McGregor v. Village of Lovington*, 202

CO-EMPLOYES.

Lines of Employment—Emergencies.—An employe called upon, without previous notice, to assist other employes of a common master in the performance of a work of an emergency character, and not in his ordinary line of employment, is warranted in supposing that such care has been taken and such skill and intelligence employed in preparing for the work, that he would not be exposed to additional danger from the slightest indiscretion of another workman or from a slight disarrangement of the appliances. *Consolidated Coal Co. v. Haenni,* 115

COMMON CARRIERS.

Duty of Common Carriers.—Common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers. *C., P. & St. L. Ry. Co. v. Lewis,* 274

COMMON UNDERTAKING. *Owners of Animals Engaged in.* 382.

Construction of Contracts.—Where the parties to a contract employ language having a plain and ordinary meaning, it is not competent for the courts to destroy that meaning even though it may appear that in certain contingencies the result would be somewhat harsh or even unexpected; it is presumed that the parties fully considered all contingencies, and if they did not, that they intended to abide by the terms of the contract in any event. *Smith v. Davis,* 198

Situation of the Parties.—In construing a contract, the situation of the parties at the time it was entered into, the property which is the subject-matter of the contract and the intention and purposes of the parties in making the contract, will be taken into consideration, and the intention of the parties carried into effect, so far as the words employed by the parties and the rules of law will permit. *Rice & Co. v. Weber,* 573

CONTINUANCE.

Want of Copy of Instrument Sued on.—A motion for a continuance upon the ground that no copy of the instrument sued on is filed with the declaration, comes too late after pleas filed in bar. *Teeter et al. v. Poe,* 158

CONTRACTS.

Appointment of Trustee, etc.—Parties.—Where, by the terms of a contract, it is expressly provided that payments should be made to a trustee to be selected, by virtue of his selection such a trustee becomes entitled to demand the money and there is no reason why he should not be permitted to enforce the demand by suit. *Smith v. Davis, Trustee, etc.,* 198

Enforcements, etc.—It is for the courts to enforce contracts as parties make them, unless there is some unconscionable or illegal feature in them. *Oliver, Administratrix, et al., v. Gill,* 424

Trustee—Capacity in Which He Acts.—Where, by the express terms

CONTRACTS. Continued.

of a contract, the parties appoint an agent or trustee, and expressly agree to pay installments of money mentioned therein to him, it can not be urged that such a trustee is the trustee or agent for both parties in the management and disbursement of the moneys. It is the duty of the parties to make the payments to the trustee, and they can not be permitted to omit doing so on the plea that in reference to the use of the money the trustee was required to regard certain other provisions of the contract intended for their protection. *Smith v. Davis*, 198

Conditional.—Upon the trial of an issue as to whether a contract of sale is conditional, it is error to admit testimony for the purpose of showing the condition of the article sold, as to its soundness, safety, material composed of and value. The tendency of such evidence is to divert the mind of the jury from the real issue between the parties, such matters not being in issue. *Coates v. Mernin*, 466

Conditional.—In an action for the price of a boiler, it was contended on the part of the defendant that the sale was conditional; that if the plaintiff would clean the boiler thoroughly, subject it to a water test of 150 to 200 lbs., paint it and deliver it at his factory he would accept it and pay \$200. The boiler was not subjected to the test but was delivered at the factory in the defendant's absence, and the question whether or not the contract of sale was conditional upon the making of such test was practically the contention between the parties. Plaintiff was permitted to prove that the defendant's son, at a time when the defendant was not present, offered to sell the boiler for \$200, and said it was a good boiler; this the son denied. *It was held* that the admission of this testimony was error. The court can not know that the denial by the son overcame the prejudicial effect of the incompetent evidence; the existing relationship of the son may have operated to deprive his testimony of full weight as against that of a disinterested witness. *Coates v. Mernin*, 466

Depending upon Future Growth, etc.—Where a contract relates to specified things, and the performance of it must, in the contemplation of both parties, depend upon the future growth and continued existence of such things, the destruction of the subject-matter of the contract excuses its performance, if such destruction is from no fault or negligence of the party who is unable to perform it. *Rice & Co. v. Weber*, 573

CONTRACTS—IMPLIED.

To Pay for Services Rendered.—Where an aged woman, helpless from age and disease, and in need of assistance and nursing, is, with her consent, taken to the house of her son for such care and treatment as she required, *it was held*, that while she may not have been fully competent to make a contract involving details, she evidently understood that the services she was to receive would not be gratuitous, and a judgment for \$1,200 was sustained. *Switzer, Special Admr., etc., v. Kee*, 375

Reservation by Verbal Agreement, 225.

CONTRACTS OF SALE.

Possession.—A contract of sale which contains a provision authorizing the vendor to resume the possession of property placed in the possession of the vendee upon the latter's failure to make payments set forth, or in case the property should be levied upon by virtue of any writ, etc., not acknowledged and recorded as required by the chattel mortgage act, is valid between the parties, but invalid as to judgment creditors. *Daniels v. Thompson*, 393

Warranty—Breach of—Rescission of Contract, 492.

Waiver of Conditions.—In a printed form of contract between a company and an agent for the sale of its goods, was this clause: "It is also agreed and understood that no agreements outside of this printed form, or differing from it, shall be of any binding force unless they are confirmed by the said first party's agent at Chicago, Illinois." *It was held*, that the agent who negotiated and procured the signature to the contract in question, not being the agent in Chicago, had no authority to bind the company by waiving this condition of the contract, or to make any agreement different from or outside of the printed form of the contract. *Singer Mfg. Co. v. Leeds*, 297

CONTRACTORS' LIENS.

Sub-contractors.—Contractors for work in the construction of a railroad have a lien expressly given them by the statute (Par. 55, Chap. 82, R. S.) superior to all mortgages or other liens accruing after the commencement of the work. Provision is made for the protection of sub-contractors to the extent of the price agreed upon between the corporation and the sub-contractor, and he acquires a lien against the railroad company by giving the notice prescribed by the statute, and complying with its provisions. *St. L. & P. R. R. Co. v. Kerr*, 496

CONVEYANCE OF LAND.

Reservation of Crops.—Crops produced by annual planting and cultivation are in some instances deemed real estate, and in others personalty, depending largely upon the character and capacity in which the contracting parties claim them.

When the parties occupy the position of vendor and vendee, the rule is well established that growing crops not severed from the soil are real property and pass to the vendee unless reserved in the deed.

Matured crops, if severed from the soil, become personalty and do not pass by a deed, but crops not severed, whether ripe or unripe, pass to the vendee by the deed as being annexed to and forming a part of the freehold. *Damery v. Ferguson*, 224

Conveyance of an Estate in Freehold.—A conveyance of an estate in freehold to commence *in futuro* is good in this State, though there be no particular estate to support it, as was necessary at common law. *Calef v. Parsons et al.*, 253

Reservation of Profits.—A reservation in a deed, of the "full and entire profits" of land for life, does not in any correct sense, either

CONVEYANCE OF LAND. *Continued.*

popular or technical, reserve any part of the estate or body of the land itself, but only the "profits" arising out of such use as may be made of the property without impairing the freehold estate. *Stewart v. Wood*, 378

Premature Delivery of a Deed under a Decree—Rights Thereunder.—Where, under a decree of sale, it was provided that the purchaser at the sale was not to receive possession nor title until February 1st, following the sale, the sale of the premises under the decree was made October 31st, and approved December 7th. On December 14th, the purchaser induced the master to deliver to him the deed under the decree, giving him as payment of the purchase money a certified check upon a bank, conditioned that it was not to be presented until February 1st. Upon receipt of the deed the purchaser demanded the rent of the premises, and being refused, brought replevin. *It was held*, that the purchaser took nothing by the premature delivery of the deed in addition to his rights under the decree, and that he was not entitled to the rents; that the delivery of the check to the master was not a payment, but an order for the payment of the money at a future day; that the certificate of the officials of the bank upon which it was drawn, that it would be paid, added only security for the payment to the extent of the solvency of the bank. *Argo et al. v. Oberschlake et al.*, 289

COPY OF INSTRUMENT SUED ON. *Continuance for want of*, 158.

CORPORATIONS, ETC.

Duty to Make Works, etc., Reasonably Safe.—It is the duty of a corporation to use ordinary care to make its works and appliances reasonably safe and fit for their intended uses. *Penwell Coal Mining Co. v. Diefenthaler, Administrator, etc.*, 616

Duty of Directors.—The duty of a director of an incorporated company requires him to know what the corporation is doing and it is negligence in him not to know; but it does not follow as a legal sequence that he is conclusively presumed to have known of its doings, and having made no objections, is to be considered as assenting to an excess of its indebtedness above its capital stock within the meaning of Sec. 16, Ch. 32, R. S., making the directors and officers liable for such excess to the creditors of such corporation. Such a construction would predicate the liability upon a mere neglect of duty in not keeping advised of the corporate action, whereas the ground of liability fixed by the statute is an assent to the excessive indebtedness. *Lewis v. Montgomery*, 282

Duty in Employing Agents.—With a corporation the work of planning, selecting material for, making and placing appliances and constructions required in its business must of necessity be intrusted to natural persons as its agents. Its duty in this respect requires of it no more than to take ordinary care, and appoint for the work such agents as are competent and likely to do it properly. *Penwell Coal Mining Co. v. Diefenthaler*, 616

Insolvent—Transfer of Stock in, 481.

CORPORATIONS, ETC. *Continued.*

Liability of Officers—Statutes, Construction of, etc.—In a suit brought upon a statute providing that "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation," it appeared that the stock of the corporation was mainly held by one man and that its affairs were practically under his exclusive management. The other stockholders, while occupying the position of directors, gave but little, if any, attention to the business, and were not aware of the condition of the company until it was about to be placed in the hands of a receiver. It was contended that by using proper care they might have ascertained the condition of affairs; having failed to do so they were guilty of negligence, and must therefore be regarded as having assented to the indebtedness. *It was held* that the liability under the statute must be predicated upon assent, and this must involve knowledge; without knowing that a thing exists one can not be said to assent to it. It is not sufficient that he neglects to do that which would lead him to knowledge. The statute does not impose a liability for mere negligence in not properly discharging the duty of an officer or director.

Lewis v. Montgomery,

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Proof of Corporate Existence.—It is error to instruct the jury that before the plaintiff, a corporation, could recover, it was necessary to produce its charter, showing its authority to exercise the powers of a corporation, when it was shown by the proofs that the defendant had repeatedly recognized the corporate existence of the plaintiff, in reference to the transaction in question. *Walker Paint Co. v. Rugles,*

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CORPORATIONS OF OTHER STATES.—*Liability of Stockholders in,* 481; *Resident—Foreign Shareholders,* 429.

Ultra Vires.—Corporations have such powers as are expressly given them by the law which authorizes their creation, and such other powers as are necessarily incidental to the proper exercise of such express powers. Such express powers are readily ascertained from the statute or the charter of the corporation. *McCrary v. Chambers,*

445

COSTS. *Liability of Municipal Corporations,* 643, 663.

COSTS IN EQUITY.

Awarded in Accordance with Right.—Patrick J. Fleming filed a bill of interpleader against James Tearney, Patrick Tearney and Patrick Kealey, setting up that James Tearney, a minor, was in his employ during the season of 1890; that he owed for the work \$95.90; that his father, Patrick Tearney, being still living, he supposed the wages were due to and the property of Patrick Tearney in right of a parent; that James claimed them as being emancipated; that Patrick Kealey, holding a judgment against Patrick Tearney, garnisheed Fleming, and judgment was rendered against him for \$39.90 and costs of suit; that Fleming, to protect himself, prayed an appeal

COSTS IN EQUITY. *Continued.*

to the County Court, where the case was still pending; and that James Tearney commenced suit against him in the same court for said wages, which suit was also still pending, and praying that James Tearney, Patrick Tearney and Patrick Kealey interplead, and for an injunction against Kealey and James Tearney and Patrick Tearney from prosecuting their suits, etc. *It was held* error to award that the costs of the proceeding, and of the suits in the County Court of Patrick Tearney for the use of Patrick Kealey, by his next friend, Patrick Tearney, against Patrick Fleming, and of James Tearney against Patrick Fleming, be paid by the clerk of the Circuit Court out of the fund to be paid into his hands by the complainant, and that the residue be paid to James Tearney. *Tearney v. Fleming*, 507

In Equity Proceedings.—The imposition of costs in chancery suits rests in the sound discretion of the court. *Citizens Ins. Co. v. Hamilton*, 593

COURTS. *Judges Presiding*—*Presumption*, 190; *Right of Judges to Preside*, 190.

Power of the Court over its Judgments after Adjournment.—The rule that a judgment can not be opened by the court rendering it, for any cause, after the close of the term at which it is rendered, does not apply to courts of equity, where the ground for opening such judgments is fraud or mistake. *Schlink v. Maxton*, 471

COUNTY COURT. *Equitable Jurisdiction of*, 471.

CUSTOM.

The Office of a Custom.—The true office of a custom, in this respect, is not to change a contract, but to make clear its true meaning when its terms are ambiguous or uncertain, or when words are used which have a trade, or commercial, or peculiar meaning. *Bloomington Canning Company v. Bessee*, 341

Express Provision of a Contract—Custom, etc.—The express provision of a contract can not be radically changed and avoided by a general custom or usage. *Bloomington Canning Company v. Bessee*, 341

CREDITOR'S BILL.

Against Stockholders of a Defunct Corporation.—A creditor of a corporation may, after judgment against it and return of execution *nulla bona*, file a creditor's bill against one or more stockholders delinquent for non-payment of stock subscriptions. It is not indispensable that all should be joined; a delinquent stockholder may, by cross-bill, bring in other delinquent stockholders and enforce contribution. *Palmer et al. v. Wood et al.*, 630

CRIMINAL LAW. *Disorderly Conduct Defined*, 60.

CROPS. *Growing*—*As between Vendor and Vendee*, 225; *Matured from Soil*, 225; *Reservation of in Conveyances*, 225.

CRUELTY. *Cause for Divorce*, 382.

DAMAGES.

In trials under the act giving a remedy for injuries caused by the

DAMAGES. *Continued.*

sale of intoxicating liquors, it is not necessary that any witness should point out by his testimony any definite basis upon which to estimate the damages. If there is enough when all the evidence is considered to make the inference reasonably clear, the proof is sufficient. *Herring et al. v. Ervin et al.*, 369

Judgment of the Jury.—Necessarily the estimate of damages for personal injuries and suffering must depend upon the judgment of the jury; there can be no direct proof in regard to it, and witnesses can not be allowed to express an opinion upon it. *C., P. & St. L. Ry. Co. v. Lewis*, 274

On Dissolution of Injunction, 182; *Future Right of Action*, 354; *Injuries Occasioned by Sale of Intoxicating Liquors*, 369.

Five Thousand Dollars Not Excessive.—Where a person thirty-one years old, in good health, his labor furnishing the only means of support for his wife and three children, is killed while in the employ of a railroad company under circumstances which entitle his representatives to recover, \$5,000 damages are not excessive. *Chicago & Eastern Illinois R. Co. v. Kneirim*, 243

Nuisances, 247.

Special Damages—When Speculative, etc.—Special damages, which are merely speculative, like probable profits, or not within the contemplation of the parties at the time of this contract, or not ascertainable with reasonable certainty by the usual rules of evidence, can not be recovered. *Koch & Co. v. Merk*, 24

Speculation, etc.—A recovery is denied only when speculation or conjecture has to be employed to determine whether the injury is the result of the wrongful acts charged in the declaration, or from some other cause. *City of Jacksonville v. Doan*, 247

DEATH OF A PARTY.

Where, in a suit in chancery, a party defendant dies after the cause is submitted and while under advisement, the court may, upon rendering the decision, dismiss the bill as to deceased party (no administrator having been appointed), or may enter its decree *nunc pro tunc* on motion of the complainants, or possibly the surviving defendants. *Palmer v. Wood*, 630

DECREES.

Appeal of a Portion of the Parties.—Where a part of the parties affected by a decree in equity appealed and the same was reversed, it was held, that the entire decree was reversed, although some of the parties did not appeal. *Bradford v. Bennett*, 145

Conclusive as to Matters Adjudicated.—The Appellate Court can look to the decree alone to ascertain what was adjudicated in the court below. *The Granite State Provident Association v. Sonderman*, 433

DECREE IN PERSONAM.

What is, etc.—In a suit to foreclose a mortgage brought against the administrator and the heirs of a deceased mortgagee, none of whom

DECREE IN PERSONAM. *Continued.*

were personally liable for the payment of the mortgaged debt, the court found that there was due from the defendants to the complainants, the sum of \$1,263.61 and \$50 attorney's fees and ordered that the defendants pay to complainants within ten days the said sum with lawful interest, etc., and that in default of such payment the mortgaged land or so much thereof as might be necessary to satisfy the debt, etc., be sold at public vendue for cash, etc., and out of the proceeds to pay the costs and amount due the complainants. *It was held* that the decree was objectionable in so far as it purports to find an amount due from the defendants to the complainants, and in ordering them to pay the same, but that it was not in this proceeding a decree *in personam*. *Phelan et al. v. Iona Savings Bank, et al.*, 171

DEEDS. *Delivery Essential*, 290; *Premature Delivery of under a Decree*, 289; *Reservation in Waste*, 378.

DEFAULTS, 317; *Effect of Mortgagee at Common Law*, 289.

DELIVERY of a Deed *Essential*.—The delivery of a deed is essential to the conveyance of land. It is the final act of conveyance and without it all other formalities are ineffectual. Even though executed, a deed has no effect to pass title unless delivered, and it takes effect, not from the date of its execution, but from the date of its delivery. *Argo v. Oberschlake*, 289

DESERTION.—*A Cause for Divorce*, 383.

Reasonable Cause.—A wife may for "reasonable cause" decline to live with her husband, though she may not have sufficient statutory ground for divorce. In such case she may require him to contribute to her support, and so it is error in a proceeding for divorce on the ground of desertion, and a cross-bill alleging extreme and repeated cruelty, to charge the jury that as far as relates to the alleged acts of cruelty, if they believe from the evidence that the wife did leave the husband and remained away, as charged, then, to justify such leaving and absence on the ground of cruel treatment, the jury must believe from a preponderance of the evidence, that the husband actually committed an act, or acts of personal violence to her person, prior to the time of the alleged desertion. *Schoen v. Schoen*, 382

DILIGENCE AND CARE.

Required of Persons with Defective Vision, etc.—A person afflicted with defective vision and partially disabled in limb, and incumbered with a bundle in her arms, in passing over inequalities and uneven places in sidewalks, that other persons having normal powers of vision and normal strength, and suppleness of limb, would readily discern and without conscious effort pass over in perfect safety, will be held to exercise greater care and prudence to pass along and over such places in safety than is required of others having ordinary powers of sight and locomotion. *Smith v. City of Cairo*, 166

DISORDERLY CONDUCT.

It is not the law that any threatening or insulting words, gesture or motion amounts to disorderly conduct. It may be of such a char-

DISORDERLY CONDUCT. *Continued.*

acter or so provoked or conditioned as to be fully justified. *City of Jacksonville v. Headen,* 60

What is, etc.—A farmer who resided in Morgan County more than half a century, and notwithstanding some habits not to be commended, was upon the whole a respectable man and good citizen, went to Jacksonville, where he took one drink of whisky and two glasses of beer, was a little loud in a political discussion and swore some about the tariff, but according to the great preponderance of the evidence, he was not intoxicated, used no obscene language, and showed no disposition to harm anybody. *It is held,* that the verdict of jury finding that he was not guilty of violating an ordinance of the city against conducting himself in a disorderly manner would not be disturbed. *City of Jacksonville v. Headen,* 60

DISTRESS FOR RENT.

A tenant sold his grain to S., who was a grain dealer, and had, from the proceeds, paid his landlord all that was due him, except \$200. The landlord claiming a lien upon the money requested S. to pay it to him; the tenant instructed S. to do so; under this state of facts, *it was held,* that the landlord having a lien upon the money which was recognized by both S. and the tenant, and having asserted such lien, to which the tenant assented, it should be regarded as an appropriation of the money by the landlord, and before he can proceed against the tenant by distress for that amount he ought to show a failure, upon a reasonable effort, to get the money. *Crone v. Bane,* 287

DITCHES.

When Permanent Structures—Statute of Limitations.—When a ditch by construction or by act of the parties becomes a permanent structure, a failure to bring an action for damages occasioned by it within the statutory period, operates as a bar to a recovery by the owner or his grantees. *Baker v. Leka,* 353

When Permanent Structures in a Legal Sense.—The question as to when a ditch is a permanent structure in a legal sense is not to be determined from a consideration alone of its enduring character, or that, if not changed by the hand of man, it would likely continue forever. To be permanent in a legal sense a structure must, in addition to being permanent or enduring within itself, be such that its continuation is lawful, because if not lawful it is subject to be removed or abated by a legal proceeding, and therefore can not be deemed permanent. *Baker v. Leka,* 353

DIVORCE.

Desertion—Cruelty.—It is a condition of the right of divorce on the ground of desertion, that the desertion was without any reasonable cause, but it is not necessary that there should be personal violence before the wife may withdraw from the husband. When he pursues a persistently unjustifiable and wrongful course of conduct, which will necessarily and inevitably render her life miserable and unendurable, she has reasonable cause for leaving him and may

DIVORCE. Continued.

interpose it as an answer to a charge of desertion. *Schoen v. Schoen*, 382

Instruction Assuming a Conclusion.—Upon the trial of a divorce suit upon a bill by the husband, charging desertion, and a cross-bill by the wife, charging cruelty, it is error to charge the jury that if they believe, from the evidence, that at the times the cruelty as charged in the cross-bill, are alleged to have been committed, the wife was suffering from hysteria or other illness, and that the tendency of her illness was to derange, or partially derange, her mental faculties and to give her false and imagined views and impressions of what actually occurred, and if the jury further believe, from the evidence, that her mind at those times was so affected, then these facts are proper to be taken into consideration by the jury, in connection with all the other evidence in the case, in determining what degree of credibility should be attached to her testimony relating to such offenses, because it assumes a conclusion which might or might not be deducible from the evidence, it appearing from the evidence that appellant was in poor health at times, and that, at times, she was considerably excited, but there was no evidence to show that she was suffering from hysteria, or that her illness was of such a character as to affect her mental capacity to state truthfully what occurred. *Schoen v. Schoen*, 382

DRAINAGE.

Burdens of the Servient Proprietor.—This burden the owner of the lower land must accept, but he is not to be burdened with or damaged by the discharge of water upon his premises, the flow of which has been by the owner of the upper land directed from its natural course by ditches and thus brought to his land, when in the course of nature such water, but for the artificial ditches or drains, would have flowed in another direction. *Baker v. Leka*, 353

Rights and Burdens.—In respect to the rights and burdens of drainage, individuals hold their ownership in land in accordance with the natural conformation of the ground. The right of the owner of the dominant heritage to drainage is based wholly on the principle that nature has ordained such drainage. He may cast upon the servient heritage such water as naturally there descends, and may in the exercise of good husbandry collect such water by ditches and discharge it with increased flow and in greater quantities upon the lower lands than would in the course of nature occur, provided it be discharged into a natural channel or watercourse. *Baker et al. v. Leka*, 353

DRAINAGE PROCEEDINGS.

Practice--Appeals.—An appeal from an order of the County Court annexing lands to a drainage district under Sec. 58 of the act to revise and amend the Drainage Act of May 29, 1879, approved June 30, 1885, (Hurd's Statutes, 1891, p. 571,) is properly taken to the Circuit Court under the general provisions in R. S., Chap. 37, Sec. 122. *Allman v. Lumsden*, 17

DRAINAGE PROCEEDINGS. *Continued.*

Final Order.—An order of the County Court annexing lands to a drainage district is a final order, from which an appeal lies. *Allman v. Lumsden*, 17

DOMESTIC ANIMALS. *Injuries to by Railroads*, 251.

EJECTMENT. *Between Owners of Joint Estates*, 126.

EMPLOYEE'S RIGHT.

To Assume that Appliances, etc., are Reasonably Safe.—Where an employe of a company is unexpectedly called upon to assist other servants or employes of the company in performing a work not in the usual line of his employment, for instance, raising and placing in position a smoke-stack, without an opportunity of seeing or knowing whether the appliances are properly constructed or in fit and safe condition for the work, such employe has the right to assume that the arrangement of the appliances and machinery for performing the work had been so skillfully and carefully planned and executed that those assisting in operating would not be unreasonably exposed to danger other than such as was inseparable from the character of the work about to be done. *Consolidated Coal Co. v. Henni*, 115

EQUITABLE AND LEGAL RIGHTS AND SUBROGATIONS, 322.

EQUITY.

A Rule of Equity.—It is a rule of equity that the vigilant and not the slothful shall enjoy its favor; so, where a plaintiff, who had obtained a judgment in 1882, which was radically defective, to his injury, had caused an execution to be issued upon it, and after a return of *nulla bona*, permitted his judgment to remain in its defective condition more than six years, and when, after he received all that in point of law he was entitled to on the face of the record, he gave notice for the first time to a purchaser of real estate affected by the judgment that he would apply to the court to have his judgment amended, *it was held* that he was guilty of gross laches, and in no condition to ask for equitable relief upon the ground that the purchaser, who was guilty of no actual fraud and who had no actual knowledge of the true state of things, was bound to examine the whole record, and to assume that at some time in the future the plaintiff would obtain an amendment to his judgment. *Calef v. Parsons*, 253

Equitable Jurisdiction of the County Court.—The County Court has equitable jurisdiction in respect to all matters pertaining to the settlement of estates, and in a proper case it may set aside an allowance of a claim after the close of the term at which it was allowed, and require the parties to proceed *de novo*, and such a case is presented when it appears that fraud or mistake has intervened so that a court of equity, if the facts were before it, in a bill to set aside a judgment, would entertain jurisdiction. *Schlink v. Marton*, 471

Equity Follows the Law.—Equity follows the law, and where no equitable considerations intervene, or where equities are equal, it will leave the parties to the situation assigned them at law. *Calef v. Parsons*, 253

ERROR. *Immaterial in Instructions*, 158.

ESTATES. *Conveyance of Freehold*, 253.

ESTOPPEL.

Binding upon Principal in a Bond, Binding upon his Sureties.—The principal in an official bond (in this case being the county treasurer) is estopped to deny the truth of his own reports and records. It is a part of his official duty to keep correct accounts and make correct reports. To secure the performance of this duty is one of the objects and conditions of his bond. He can not be heard to falsify his own official records, and whatever binds him in this respect, binds his sureties. *Doll et al., impleaded, etc., v. The People, etc., use of County of Clark*, 418

EVIDENCE.

Admissibility under the General Issue.—Any evidence which tends directly to show that the plaintiff did not have a subsisting cause of action at the commencement of the suit, is admissible under the general issue. *Huff v. Wolfe*, 589

Admission of Incompetent, Not Always Prejudicial.—The admission of testimony not essential to a right of recovery, but not at all prejudicial to the opposite party, is not sufficient cause for setting aside a verdict. *Springfield Marine Bk. v. Mitchell*, 486

Competency of Witnesses, 140.

Introduction, Objection and Exceptions.—Where evidence is offered and the opposite party objects, and the court overrules the objection, an exception must be taken to the ruling of the court if the party, deeming himself prejudiced thereby, desires to assign the ruling of the court for error on appeal. *City of Bloomington v. Legg*, 459

Object of Ordinances, 208; *Other Accidents in Actions for Personal Injuries*, 459; *Rules of as to Weight of—Receipt*, 85.

Precautions after an Accident.—Evidence of precaution, taken after the occurrence of an accident, is apt to be interpreted as an admission of negligence, and should not be admitted. *City of Bloomington v. Legg, Administrator, etc.*, 459

Presumption as to Signature, 121.

Production of Books and Papers.—Sec. 9, Ch. 51, R. S., providing that the several courts shall have power in any action pending before them, upon motion and good cause shown, and reasonable notice thereof given, to require parties to produce books or writings in their possession, or power, which contain evidence pertinent to the issue, was designed to invest courts of law with more power than they had previously exercised in reference to the production of private writings. *Meeth v. Rankin Brick Co.*, 602

Technical Difference between Evidence and Testimony, 228.

EXCEPTION. *To Master's Report*, 317.

EXEMPLARY DAMAGES. *Included in General Damages*, 294.

FACT.

Determining Questions of.—In determining questions of fact and in passing upon the question as to whether a verdict is against the weight of the evidence, the Appellate Court will take into consideration all matters affecting the credibilities of the witnesses, such as the apparent interest of the witness, his opportunities of knowing the matters about which he testifies, the reasonableness or unreasonableness of his testimony, when tested by rules of common sense and judgment, or when compared with other matters in evidence and undisputed so far as such matters appear of record, and will exercise a judicial discretion and judgment in determining the same. *O'Bannon, Executrix, etc., v. Vigus,* 84

FEDERAL COURTS. *Jurisdiction of, under Patent Laws, 454.*

FELLOW-SERVANTS.

A yard switchman, employed by a railroad company to assist in switching cars, his duties being to couple and uncouple cars and to manage the brakes upon cars which were being switched in distributing cars about the yard, and the car inspector, are not fellow-servants within the rule as laid down in this State. *Chicago & Eastern Illinois R. Co. v. Kneirim, Administratrix, etc.,* 243

Who are.—A person was employed as a "mine blacksmith for Mine No. 10;" the employer (a corporation) was about to raise a smoke-stack from the ground and place it in position on a base prepared for it on the roof of the boiler-house of "Mine No. 9." No particular servants of the company were charged with the duty of raising stacks, such work being required only at long intervals. It was customary to call upon any of its employes to assist in the work, and so notified the blacksmith, while he was at work at his anvil, to assist in raising the stack. While doing so, appliances gave way and the stack fell upon him and he was injured. The mode of doing the work of arranging the ropes and pulley by which the stack was to be raised was devised and constructed by servants of the company, who were superior in authority to the blacksmith, and with whom he in no wise co-operated in the work, nor was he consulted about it. Under such circumstances the fact that the arrangements were made and machinery constructed and furnished by other servants of the company will not relieve the common master from liability arising from a defect in the machinery or from a lack of ordinary care and skill in the preparation of the contrivances to do the work of raising the stack. The relation of fellow-servants does not exist between them and the blacksmith. *Consolidated Coal Co. v. Haenni,* 115

FENCES. *Failure of Railroads to Fence Track, 36.*

FORCIBLE ENTRY.

Where a person enters upon the possession of another without his consent, and by removing the fence and resetting the same, takes possession of a strip or parcel thereof, it is a forcible entry under the terms of the statute and sufficient to support the action. *Coverdale v. Curry,* 213

FORCIBLE ENTRY AND DETAINER. *Concurrent Remedy*, 190.

Preliminary Steps.—In an action of forcible entry and detainer, brought under the sixth clause of section 2, chapter 57, R. S., which provides that when lands have been sold under the judgment of any court and the party to such judgment or decree refuses, after the expiration of the time of redemption and after demand in writing, to surrender possession to the person entitled thereto, such person may recover the possession by an action of forcible entry and detainer. The person entitled to such suit is not required before commencing his suit to serve upon the person in possession a copy of the decree and produce and exhibit his deed, as in proceedings to procure a writ of assistance. In such cases the person entitled to possession is required only to comply with the statute—that is, to make a demand in writing before commencing his suit. *Brackensieck v. Vahle*, 312

FORECLOSURE. *Jurisdiction of Court to Render Decrees in*, 171.**FORECLOSURE PROCEEDINGS.**

Forcible Entry and Detainer—Writ of Assistance—Concurrent Remedies.—The purchaser of lands under a decree of foreclosure may obtain possession by a writ of assistance from the court which rendered the decree, or by an action of forcible entry and detainer under the statute. These are concurrent remedies, and both may be resorted to and prosecuted until possession is obtained through one or the other. *Vahle et al. v. Braeckensick*, 190

Premises Subject to Different Liens.—Where the owner of property mortgages to secure his own and his wife's obligation and afterward mortgages to the same person to secure the obligation of another person, such person joining in the mortgage, and subsequently sells the land, the purchaser takes it subject to both liens and is bound to discharge the one as well as the other, if he wishes to obtain a perfect title. It is not error in a decree of foreclosure to hold the premises subject to both liens generally, and provide for the sale of the premises in case the defendant fails to discharge them. *Wright, Impleaded, etc., v. Jacksonville Benefit Building Association*, 505

Sales en Masse.—Ordinarily, a decree of foreclosure may be wholly silent as to the order in which the premises shall be offered for sale, but when the mortgaged lands consist of separate government subdivisions belonging to different persons, the decree must so direct the order of sale of the lots or tracts, as to preserve the rights and equities of the separate owners. A decree absolutely requiring such premises to be sold in one body, in the absence of imperative reasons, can not be upheld. *Skaggs v. Kincaid*, 608

FOREIGN CORPORATIONS.

Resident Shareholders.—Under paragraph 26, R. S., Ch. 32, providing that foreign corporations and officers and agents thereof doing business in this State shall be subject to all the liabilities, restrictions and duties that may be imposed upon corporations of like character

FOREIGN CORPORATIONS. *Continued.*

organized under the general laws of this State, and shall have no other or greater powers, a foreign homestead and loan association, doing business in this State, will be subject to the laws of this State, and a resident shareholder therein will be entitled to withdraw his stock and to sue for and recover payments made by him, upon giving thirty days notice, etc., as required by section 6, R. S., Chap. 32, notwithstanding the provisions of the charter and by-laws of such foreign corporation to the contrary. *Granite State Provident Ass'n v. Lloyd*, 429

FORFEITURE.

Lease for Non-Payment of Rent.—The common law rule that to create the forfeiture of a lease for the non-payment of rent, a demand for payment must be made upon the premises, is dispensed with by necessary implication arising from our statutes. *Howland v. White*, 236

Immature Rent-notes—Surrender of Deed, 236.

FORMER ADJUDICATION.

H. sold a mowing machine to L. for \$55, telling him he would have to have the money on the first day of September, as Deering & Co.'s agent would be there on that day, and he would have to pay for all the machines he had sold. L. did not pay for the machine, H. paid Deering & Co. for it and sued L. for the price. On the trial it was shown that Deering & Co. had sued L. for the same machine and on the trial of that suit L. testified that he owed H. for the machine and not Deering & Co.; that he bought of H. and did not know Deering & Co. in the transaction. A judgment against Deering & Co. followed. Upon the trial of this suit in the court below, L. insisted that the adjudication in that suit was a bar to this, and asked for and got from the court the following instruction: "The court instruct the jury that if they believe from the evidence that the same identical subject-matter involved in the former suit testified to was the same that is involved in this suit, and that such subject-matter has been adjusted, then in that case you should find for the defendant." *It was held* error, as the evidence offered no ground for the hypothesis that the subject-matter of the suit was involved in the former, but was against it. It was not the machine but the indebtedness for it that was the subject-matter of both these suits. *Hoke v. Lowe*, 126

FRAUD. *Sale of Property—Matrimonial Rights*, 327.

FREEHOLD ESTATES. *Conveyance of*, 253.

GENERAL DAMAGES.

General damages include exemplary or vindictive damages. *Colby v. McGee*, 294

GIFTS.

Causa Mortis and Inter Vivos and Otherwise.—The experience of ages has demonstrated the wisdom and the necessity of guarding such bequests or gifts of property against fraud, under influence

GIFTS. *Continued.*

and imposition. All the States of our Union have statutes designed to supply such safeguards. If a person desires to make a solemn disposition of his property, to take effect only after his death, yet leaving him, so long as he may live, fully empowered to change such disposition, or to apply its subject-matter to his own use or to any other purpose, he must do so by a will, in strict conformity with the statutory enactments regulating such bequests. *Trustees, etc., v. Hall,* 536

Causa Mortis and Inter Vivos.—A gift *inter vivos* is only enforced when it is a completed gift. The donor must relinquish absolutely and irrevocably present and future dominion and power over the subject-matter of such gift. True the delivery may be in escrow to vest upon the happening of such an event, but this contingency must not be at the mere will or pleasure of the donor. If such a gift is not completed during the lifetime of the donor, his death revokes the part which has been performed. *Trustees, etc. v. Hall,* 536

Causa Mortis and Inter Vivos.—There are two kinds of gifts: 1. Gifts simply so called, or gifts *inter vivos*, as they were distinguished in the civil law; and 2, gifts *causa mortis*, or those made in apprehension of death. An instruction stating that if a person, when sick, and not expecting to get well, give money to another, and afterward recover from his sickness and repossess himself of the money, defines a gift *causa mortis*. *Marsh, Adm'r, etc., v. Prentiss et al.,* 74

Gifts Inter Vivos.—Where an aged wife took a package of money from a book-case, and gave or delivered it to her husband, saying that she was getting in poor health, and did not expect to live very long, that she wanted him to take it, and at her death bury her, pay the funeral expenses, and the balance was his, it was held to be a gift *inter vivos*. *Marsh v. Prentiss,* 74

Gifts Inter Vivos—Promissory Note—Consideration.—John O. Bolin, a man of a religious turn of mind, conferred with the officers and members of the board of trustees of the Illinois Christian Missionary Convention, relative to making a provision for the institution. About January, 1886, he went to J. W. Boren, and handed him certain papers and said to him, "'Squire; if anything happens to me, mail these letters." One of them was directed to A. McLean, and stamped. The others were all inside of a blank envelope. Mr. Bolin said to Boren, "Inside, the blank one, will tell you what to do." Mr. Boren took the letters, wrote across them the name of John O. Bolin, and said to him, "If anything happens to me, these belong to you." In January, 1889, Bolin died. Boren mailed the letter directed to A. McLean to him. It contained a note for two thousand dollars. On opening the blank envelope, among others was another envelope directed to N. S. Haynes, evangelist, etc., properly directed and stamped. This letter Boren mailed, and it

GIFTS. *Continued.*

was received by Mr. Haynes, and contained a note for two thousand dollars, of which the following is a copy:

\$2,000.

MILTON, Pike Co., Ill.

Ten years after date I promise to pay to the trustees of the permanent fund of the Illinois Christian Missionary Convention two thousand (2,000) dollars, without interest, for such fund, and in consideration of one (1) dollar and other valuable considerations, I hereby agree in the event of my death before the maturity of this note, said note shall in that case become absolutely due and payable.

J. O. BOLIN.

Edward N. French was appointed administrator of the estate, and the trustees commenced suit against him. He pleaded general issue and want of consideration. A trial was had before the court. Upon the hearing of the case the court gave judgment against the plaintiff for costs, holding that the note was never delivered, and was without consideration. Upon appeal it was held that the judgment of the Circuit Court was correct. *Trustees, etc. v. Hall*, 536

Guardian ad Litem—Formal Answer.—The answer of a minor by his guardian *ad litem*, although formal, is sufficient to interpose any defense which appears in his behalf in the evidence. *Skaggs v. Kincaid*, 608

Guardian and Ward—Agreements Between.—Agreements between a guardian and his ward, upon arriving at legal age, appearing to be fair and just, and not tending unduly to the benefit of the guardian, may be upheld. *Huff v. Wolfe*, 589

Agreements.—Agreements between a guardian and his ward fixing his compensation, though made after the ward has arrived at legal age, are to be viewed with suspicion and zealously scrutinized. It is presumed that the influence of the confidential relationship of the parties exists until final settlement and payment is made, and all transactions and dealings between them, prejudicially affecting the interest of the ward, are held to be constructively fraudulent. *Huff v. Wolfe*, 589

GUARANTY.

Contract of.—Where a company manufacturing implements entered into a contract with a person to sell the same for cash or notes and that all notes taken should be indorsed by such persons as follows—"For value received, we hereby guarantee the payment of the within note and waive protest, demand and notice of non-payment thereof," and such person having so indorsed a note taken in payment of an implement sold, it was held that the fact that the company sent out one of its agents to assist such person in making sales, and who assisted in making the sale in question, and advised taking the note, etc., did not make the sale of the implement sold, the sale of the company, so that the guaranty, being made after the sale, would be without consideration. *Long & Alstatter Co. v. T. J. Hill et al.*, 517

HABITUAL USE.

Of Intoxicating Liquors.—Taking the several questions relative

HABITUAL USE. *Continued.*

to liquor, tobacco and opium, embraced in the general interrogatory, it must be apparent that a liberal and reasonable construction should be applied. It can not be supposed it was understood that the applicant had never taken liquor or opium, and that he was ignorant of the taste of either. Such a construction, literally applied, would exclude the great mass of men, and would reduce the ranks of insurance organizations to an unprofitable minimum. *A. O. U. W. v. Belcham*, 346

HIGHWAYS. *Injunction to Restrain Commissioners in Repairing a Highway*, 67.

Commissioners of Highways—Injunction.—Where the commissioners of highways in repairing a highway were about to fill up a ditch, they were restrained from doing so by an injunction. In their answer to the bill they answered that they were not merely intending to fill up the ditch, but also to put a culvert across the road so that the water from the complainant's tile drain could flow in its natural course, as it did before the road was graded up. The evidence showed that they were putting in the culvert when the writ was served, and it was conceded that by a culvert at that place the water would flow in its natural course. *It was held*, that the injunction was properly dissolved. It was the duty of the commissioners, under the statute, which gave them charge of the road and required them to keep it in repair, to improve it as far as practicable. *Henline v. Stack et al.*, 67

HOMESTEAD RIGHT.

In a proceeding by creditor's bill, where a decree is entered for the sale of real estate, and an appeal taken, the question of homestead rights can not be raised for the first time in the Appellate Court. *Maddox v. Epler*, 265

HOMESTEADS.

Exemption from Sale on Execution.—A party and his wife not residing in a home of their own, purchased a vacant lot on which to erect a dwelling for their family, the deed for the same being delivered to him eleven days afterward. Before the delivery of the deed he had the lot inclosed, a garden broken, the foundation for the house laid, and the lumber for its completion on the ground. About a month afterward his family moved into it, though it was not yet quite completed. About a week before the family moved into the house, a person having a justice's judgment against him, filed the same in the office of the clerk of the Circuit Court, caused an execution thereon to be issued and delivered to the sheriff, under which he levied and was proceeding to sell, when he was enjoined. It was contended that because he was not, at the time the execution was placed in the sheriff's hands, residing with his family upon the lot, he had no homestead therein, but *it was held* otherwise, and the injunction made perpetual. *Webb, Sheriff, etc. v. Hollenbeck*, 514

HOMESTEAD AND LOAN ASSOCIATION.

Withdrawal of Stock—Construction of Statute.—Section 6 of

HOMESTEAD AND LOAN ASSOCIATION. *Continued.*

the Homestead and Loan Association Act of this State, R. S., Ch. 82, Par. 73, providing that any stockholder wishing to withdraw from the said corporation, shall have power to do so by giving thirty days notice of his intention to withdraw, and shall be entitled to receive the amount paid in by him, and such interest thereon or such proportion of the profits as the by-laws may determine, less all fines and other charges, relates only to corporations formed under the laws of this State, but will control the remedy of resident shareholders in non-resident corporations doing business in this State, the by-laws of such foreign corporations to the contrary notwithstanding. *Granite State Provident Association v. Lloyd,* 429

HUSBAND AND WIFE. *Transfers of Property between,* 387.

Wife's Separate Property.—Where a wife permitted her husband to use her money in his business operations and to buy and take deeds in his own name, and to retain the same for a period of six or seven years, during which period he became in debt and then conveyed the land to his wife, she can not be heard, in a proceeding by a creditor's bill, to say that she had an understanding with her husband that he would protect her by putting the land in her name when it was paid for, to defeat a creditor who may have trusted her husband on the faith of the property he held with her knowledge and consent. *Maddox et al. v. Epler,* 265

Transfers of Property between Husband and Wife.—Transfers of personal property between husband and wife are valid under the statutes, though not in writing, except as against the rights and interests of third persons. *Dorsey v. Williams,* 386

INJUNCTIONS. *Against Commissioners of Highways,* 67.

Allowance of Damages on Dissolution--Services of Counsel.—Where the services of counsel are directed to the defeat of a bill in chancery upon the main question and no service is required to obtain a dissolution of the injunction, aside from the hearing on the merits, and when it is apparent that the services of counsel would be the same whether there was an injunction or not, the injunction being a mere incident and not the occasion for any special services of counsel, apart from the general defense on the merits, it is improper to allow counsel fees as damages. *Mainard v. Webb, Sheriff, et al.,* 182

INNUENDOES. *Appeal in Action for Slander,* 331.

Innuendoes.—Improper Use, etc.—Where a defendant wishes to test the sufficiency of a declaration, in respect to the proper use of innuendoes, his proper course is to demur. If the declaration wholly fails to state a cause of action, the point may be made in arrest or on error; but where there is merely a defective statement of a cause of action, the omission will be aided by the verdict. *Finnell v. Walker,* 331

INSTRUCTIONS,

Given Orally.—While the statute requires the court to instruct the jury in writing, it is competent for the parties to waive this require-

INSTRUCTIONS. *Continued.*

ment, and doing so, they are bound by their agreement to that effect. *Best v. Wilson*, 352

Assuming Facts.—An instruction which assumes that a testator signed a will, where the bill alleges that he executed the instrument claimed to be his will, the attesting witnesses testified that he signed it, and the fact that he did so is in no wise disputed, can not be regarded as erroneous. *Graybeal v. Gardner*, 305

Assumption of Facts Not Admitted.—On the trial of an issue as to whether a contract of sale is conditional, it is error to instruct the jury that it is incumbent upon the defendant to establish, by a preponderance of the evidence, a warranty claimed and a breach of such warranty, because the instruction practically assumes that the defendant purchased the property and was defending upon the ground of a warranty, etc. *Coates v. Mernin*, 466

Assuming Facts, etc.—It is not error for an instruction to assume facts conceded, and not controverted. *Haines v. Amerine*, 570

Evidence Conflicting.—In cases where the proof is of an unsatisfactory character, great accuracy and harmony should mark the instructions. *P. D. & E. Ry. Co. v. Hardwick*, 562

Corrections in Form.—The trial judge having read an instruction to the jury, was dissatisfied with it. He erased a part of it and stated to the jury that he would read it again, and did so, omitting the part erased; *this was held* properly done. *Wells v. Ipperson*, 580

In Divorce Cases, 382.

Duty of Carriers of Passengers.—It is not error to instruct the jury, in an action against a railroad company for personal injuries, that common carriers as persons are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business, to prevent accidents to passengers riding upon their trains or alighting therefrom. *C. & A. R. R. Co. v. Byrum*, 41

Error Will Not Always Reverse—Special Findings.—In an action on a promissory note, the defendant pleaded the statute of limitations, and the plaintiff replied, a payment, etc. *Held*, that under the state of the pleadings, it was error to instruct the jury that the burden of proof was upon the defendant, under his plea, to show that the suit was not commenced within the statutory period; but as the instruction only placed upon the defendant the burden of proving a matter already admitted by the pleading, it could not have operated to his prejudice, and hence, not reversible error. *Simmons v. Nelson*, 520

Immaterial Error.—In an action upon a promissory note, the court instructed the jury for the plaintiff, that if they believed from the evidence that plaintiff was the grandmother of defendant, Charles Teeter's wife, and resided with defendant Charles Teeter, and was treated as a member of the family, then they must be satisfied from the evidence that at the time plaintiff so resided with the

INSTRUCTIONS. *Continued.*

said defendant, it was expected by both parties that plaintiff should pay her board, or that the circumstances under which the board was furnished were such that such expectation was reasonable and natural, or that there was an expressed contract on the part of plaintiff to pay her board, and if the jury are not so satisfied from the evidence, the defendants should be allowed nothing by way of set-off. *It was held* that the instruction called for a higher degree of proof on the part of the defendants than the law required, and had the evidence been at all close upon the question of set-off, the court might have felt constrained to hold the giving of the instruction material error, and sufficient ground for reversing the case. *Teeter v. Poe,* 158

Intention of a Person Who Violates an Ordinance.—In an action by a municipal corporation for the violation of an ordinance against knowingly suffering or permitting domestic animals to graze on the public streets, the court modified an instruction asked by the plaintiff, so as to make it necessary to show that the defendant intentionally permitted his horse to graze on the street and gave an instruction to the same effect for the defendant. *It was held* error, as no positive or preconceived intention is necessary. A mere incidental and trifling act of grazing would not be sufficient, as if a horse were to snatch a mouthful of grass when led along the street. There must be something substantial, but it is not necessary to show a design or intention. *City of Petersburg v. Whitnack,* 663

Must be Consistent with the Issue upon Trial.—On the trial of an issue as to whether a contract of sale is conditional, instructions which deal with the law, concerning false affirmations and fraudulent representation, and advise the jury that they can not avail the defendant unless made under circumstances calculated to deceive an ordinarily prudent person, and to warrant the rescission of a contract, such representations must be both false and fraudulent, are improper, as tending to mislead the jury, and, moreover, as seeming to imply that the plaintiff had contracted for the property, and was seeking to avoid a judgment for the price, upon the ground that he had been induced to make the purchase by false and fraudulent representations. *Coates v. Mervin,* 466

Measure of Proof.—An instruction, which, as presented to the court, contains an admission that proof of any set of words alleged will be sufficient, is not rendered vicious by the court's adding "*or some one set of words.*" *Finnell v. Walker,* 331

Intoxicating Liquors.—An instruction announcing in substance that if the defendant sold liquor to the husband, which caused his intoxication in whole or in part, and that thereby the plaintiff was injured in her means of support, she had a cause of action, is proper.

The Same.—An instruction to the effect that if the husband had become a drunkard, and from that cause ceased to support his wife, she could not complain if she kept him in the same condition and prevented him from resuming his normal condition and thereby pro-

INSTRUCTIONS. *Continued.*

longed the loss entailed upon her by bad habits, which their acts assisted to maintain and strengthen, is properly refused, for the reason that the defendant would, in a legal aspect, be just as responsible for continuing the loss as for causing it in the first place, though the damages might not be the same in both cases. *Lloyd v. Kelly*, 554

Nuisances.—In an action to recover damages resulting from the discharge of offensive matter from a sewer into a creek, an instruction which states that if there were obstructions in the creek below the mouth of the sewer, and that such obstructions caused offensive matter to remain in said creek and caused damage to the plaintiff, etc., is erroneous because it is not limited to the obstructions on the plaintiff's premises, or such as were made by him or were under his control. *City of Jacksonville v. Doan*, 247

Presumptions of Law Asserted to be Conclusive.—The court erred in instructing the jury that "if they believe from the evidence that the deceased was in the employ of the defendant, and the foreman of the company directed the deceased to help about the chute just before it fell, then it was his duty to obey, and if he went under it with the foreman, then the law would presume the deceased used due care under all circumstances, and that he would not rush recklessly into danger if he knew it," for the reason that it asserts a presumption of law to be conclusive, arising upon the facts that the deceased was in the employ of the company and was directed by its foreman to go under the chute as he did; these facts being undisputed the jury was bound to find that the deceased did exercise all due care on his part. *Penwell Coal Mining Co. v. Diefenthaler*, 616

Repetition.—It is not error to refuse an instruction, the substance of which is contained in other instructions given for the same party. *Phoenix Ins. Co. v. Woland*, 535

Refusal—Repetition.—The erroneous refusal of the court to instruct the jury that an indorsement of a credit upon a promissory note was not evidence that a payment had been made, is cured by other instructions, explicitly telling the jury that they must find for the party insisting that the payment had been made, unless they believed from a preponderance of the evidence that it had not been made as claimed. *Simmons v. Nelson*, 520

Not to Withdraw Evidence from the Jury.—The court also erred in giving for the plaintiff the following instruction: "If the jury believe from the evidence that said Robert H. Kuhn was called by the manager to assist about said chute, and the manager knew it was dangerous and risk was incurred in working about it, and he did not inform the deceased of said danger, and the deceased did not know of it, then the company was guilty of culpable negligence on account of such conduct of its manager." The instruction withdrew from the consideration of the jury all evidence tending to show that the supposed ignorance of the deceased was due to his own fault. *Penwell Coal Mining Co. v. Diefenthaler*, 616

Statement that Certain Facts Amount to Culpable Negligence, Error.—While a person (Robert H. Kuhn) employed as a blacksmith

INSTRUCTIONS. *Continued.*

and a doer of general work about a coal mine was assisting the superintendent to prop up the pocket chute, then containing several tons of coal, it fell upon him and killed him. He had, himself, helped to construct the chute originally and was as well acquainted with its condition as the company or any of its officers. A suit for damages brought by his legal representative resulted in a verdict of \$3,500. It was sought to sustain the verdict upon two grounds, viz., the insufficiency of the chute, on account of its construction, to sustain the weight put upon it, and the dumping of coal into it while the deceased was at work under it, both of which were charged as negligence on the part of the company. On the trial the court gave the following instruction for the appellee: "The court instructs the jury, if they believe from the evidence that the chute was out of repair and unsafe, and that it was known to the defendant and that the manager for the company ordered the deceased to help about the chute in propping it up, and at the time the chute was heavily loaded with coal, and while deceased was under the chute, endeavoring to prop it up, coal was being dumped into the chute, of which the deceased was not informed, this would be culpable negligence under the circumstances." *It was held error*, because it informs the jury that certain facts amount to "culpable negligence" and by it the jury must have understood that the "culpable negligence" was actionable negligence, warranting and requiring a verdict for the plaintiff. Its hypothesis does not include the necessary element on the part of the deceased, that at the time of the accident he was using due care, etc. *Penwell Coal Mining Co. v. Diefenthaler*, 616

Refusal to Give on Questions Not Arising in the Case.—It is not error to refuse an instruction upon a question which does not arise in the case. *Chicago & Eastern Illinois R. Co. v. Kneirim*, 243

INSURANCE—LIFE.

Application—Construction of Questions and Answers.—The application to become a member in a beneficiary insurance association, contained the following: "I certify that the answers made by me to the questions propounded by the medical examiner of this lodge, which are attached to this application and form a part thereof, are true." Among other questions and answers the application contained the following:

"To what extent does the person use alcoholic stimulants? A. None."

"To what extent does the person use tobacco? A. Moderate."

"To what extent does the person use opium? A. None."

"Are there any inclinations that would lead you to suppose that the applicant leads or has led other than a sober and temperate life? A. None."

"Do you consider the applicant's life to be safely insurable and do you recommend that a policy be granted? A. Yes."

The answers were made by the medical examiner. *It was held*,

INSURANCE—LIFE. *Continued.*

that the answers thus made might be regarded as made by the applicant with the qualification that he had the right to rely to some extent upon the construction given by the examiner to the various questions, and the answers which the examiner made from the information he obtained by his questions to the applicant. *A. O. U. W. v. Belcham*, 846

Waiver of—Conditions.—Where a health certificate, which was required by the by-laws of an insurance association for the purpose of reinstatement after a lapse, by reason of a failure to pay an assessment, was sent to the assured, whose policy had lapsed, with a notice that it was necessary, and the assured, being an illiterate person, sent it to another person with a request to sign the assured's name to it and forward it to the association, which was done, and the association, knowing that it was not the signature of the assured, received thereafter twenty-five consecutive and regular payments for annual dues and mortuary assessments, *it was held*, that the receipt by the association of subsequent dues and assessments was a waiver of any possible irregularity in the execution of the health certificate. *Mutual Benefit Life Association of America v. Coats*, 185

INTEREST.

Sub-contractor's Lien.—A proceeding to enforce a lien by a person as a sub-contractor against a railroad company, is a proceeding to enforce a liability for money due on an instrument in writing, and is within the terms of the statute allowing interest. *St. L. & P. R. R. Co. v. Kerr*, 496

INTOXICATING LIQUORS. *Material Use of*, 347; *What is Habitual Use of*, 346; *Use of by Juries*, 305.

Injuries Occasioned by the Sale of—Damages.—Under the statute giving a remedy for injuries occasioned by the sale of intoxicating liquors, the family of the inebriate may be injured in their means of support, although not deprived of the bare necessities of life, and whatever lessens or impairs the ability of the husband and father to supply the suitable comforts which might reasonably be expected from one in his occupation and with his capacity for earning money, may be regarded as lessening or impairing this means of support. *Herring v. Ervin*, 369

Moderate Use of Liquor.—In regard to liquor it is otherwise; the taste of it is not usually repugnant, and one may occasionally indulge in it without having acquired a habit of doing so. *A. O. U. W. v. Belcham*, 346

Injuries Caused by the Sale of.—A wife is entitled to support from her husband, and may complain whenever his capacity or inclination to support her is substantially impaired or diminished. Although a husband may have previously contracted the habit which so deprived her of her legal due, yet if the supply of liquor were discontinued, he would presumably be restored to his normal condition and capacity, at least to some appreciable extent, and whatever prevented such restoration, would amount to a loss of support. *Lloyd v. Kelly*, 554

INTOXICATING LIQUORS. *Continued.*

Notice.—A person bringing an action for the recovery of damages under the statute relating to the sale of intoxicating liquors, is not bound to require the marshal to notify saloon-keepers not to sell liquors, etc., as a condition of recovery. The mere fact that by the ordinances the marshal was required to post the names of those persons whose wives would so notify him, imposes no legal duty in this respect, upon a plaintiff. *Lloyd v. Kelly*, 554

JUDGES.

Right to Preside.—Either of the three judges of the circuit may lawfully preside in any county in the circuit, for the whole or during only a part of the term or of any day of the term. *Vahle v. Braeckensick*, 190

Presiding at a Term of the Circuit Court—Presumption.—Where the convening order of the term shows that one of the judges presided at the opening of the court at the beginning of the term, or any day thereof, and a decree rendered at such term appears to be the judicial act of another judge, the presumption is not that both were presiding at the time, but that each presided at such times during the day as he lawfully should in order to perform the judicial act shown by the record to have been performed by such judge. *Vahle v. Braeckensick*, 190

JUDGMENT FOR COSTS.

Against a Municipal Corporation.—It is error to render a judgment against a municipal corporation for costs. *The City of Petersburg v. Whitnack*, 663

JUDGMENT ERRONEOUS.

Amendment at a Subsequent Term of Court—Practice—Additional Record.—A judgment was entered against the city of Jacksonville for costs in a suit for a violation of an ordinance. Pending an appeal, at a subsequent term of the Circuit Court the cause was re-docketed, and on motion of the defendant, an order was made amending the judgment by striking out so much of the record as related to costs; then an additional record was filed in the Appellate Court showing the motion, the hearing by the court of the arguments of counsel, the rulings allowing the motion, etc., to which rulings the plaintiff then and there excepted, etc. It was held that the amendment was proper. *City of Jacksonville v. Headen*, 60

JUDGMENT IN PERSONAM.

At Common Law.—At common law a mortgagee might, if he desired a judgment *in personam*, bring his action at law upon the mortgage indebtedness. *Phelan v. Iona Savings Bk.*, 171

JUDGMENT.

Proper on its Face—Costs as to a Dismissed Defendant.—Where it is assigned for error that the judgment was rendered against a party for costs made by reason of another party being originally made defendant, but as to whom the suit had been dismissed while pend-

JUDGMENT. *Continued.*

ing in a justice's court, the abstract not showing what costs, if any, were made in that court, the judgment appearing proper on its face, and nothing appearing *aliunde* to vitiate it, it will not be disturbed.

Haines v. Amerine,

570

JUDGMENTS—*Power of Court over, after Adjournment, 471.*

Jurisdiction of the Courts to Render Decrees in Personam in Foreclosure Suits.—Our courts are without jurisdiction to render judgments or decrees for the payment of the mortgage indebtedness against defendants in foreclosure proceedings. Under the statute they can only render a decree for the balance of the amount that may be found to be remaining unpaid after the mortgaged premises have been sold and the proceeds applied under the decree. *Phelan v. Iona Savings Bk.,*

171

Notice.—All persons are presumed to take notice of the judgments of the Circuit Courts, and when dealing with property subject to the liens of such judgments they are bound thereby, whether they in fact have such knowledge or not. The judgment is the recorded conclusion of the court and imports verity. Though it may be erroneous, and though upon the face of the whole record, including the pleadings in the cause, it may appear that this is such error as would induce a reversal if examined by an appellate tribunal, yet while unreversed and in full force it is nevertheless valid and binding.

Calef v. Parsons,

253

JURISDICTION.

Freehold Involved.—The question as to whether a tax deed is invalid because of defects in the proceedings upon which it is based, involves a freehold. *Angelo et al. v. Angelo et al.,*

580

JURORS.

Misconduct of—Use of Intoxicating Liquors.—Where, upon a motion for a new trial, the court is satisfied from the affidavit read that none of the jurors drank liquor in sufficient quantity, or at such times during the progress of the trial, as to affect the verdict, a new trial will not be granted. *Graybeal v. Gardner,*

305

JURY.

Questions of Fact.—Where a matter in controversy involves operations on the Chicago Board of Trade, and the defense was that they were illegal transactions because of a mutual understanding that the operations were mere speculation in the fluctuations of the market, etc., and the evidence was conflicting, the jury might have found either way, but having found for the plaintiff, their verdict was not disturbed. *Brand v. Lock,*

390

Trials by Jury—Design and Purpose.—The design and purpose of trials by jury is to secure a verdict according to the merits of the case under the law, and a judgment upon such a verdict will not be reversed even if slight errors were committed upon the trial in the admission of improper evidence or in giving or refusing of instructions. *Smith v. City of Cairo,*

166

JUSTICE OF THE PEACE.

Docket Entries—Signatures, etc.—It is not essential that the signature of a justice of the peace should be appended as a verification of his docket. *Daniels v. Thompson*, 393

LACHES.

Infants.—Infants are not chargeable with *laches*: the presumption is that they do not know their rights. *Tearney et al. v. Fleming et al.*, 507

LANDLORD AND TENANT.

Equity Follows the Law.—In equity, where there is concurrent jurisdiction with courts of law, the statute of limitations will be equally binding, but there are many cases where equity acts, not so much in obedience to the law of limitations, as in analogy to it. Aside from the cases where the statute may be applied, lapse of time will, in many cases, constitute a bar to equitable relief. *Palmer v. Wood*, 630

Unmatured Rent Notes Surrendered upon a Forfeiture of the Lease.—On the 27th day of March, 1889, Peter and Julius Keister, tenants in common of certain premises, joined in a lease to John P. White, by which Peter leased his half for one year and Julius his half for two years. In payment of the rent to Julius, White made and delivered eight promissory notes, each for \$116.66, with Minerva White as security. The first note fell due March 27, 1891, the next, September 27, 1891, and the others ninety days apart thereafter. On April 20, 1889, Julius assigned the notes and lease to Johnson & Knight, who, seven days later, assigned the lease and transferred the notes to S. W. Kinkaid. On or about June 1, 1891, Minerva White, the defendant, purchased the notes and lease of Kinkaid, who assigned the lease to her. On December 10, 1889, White assigned the lease, which had been executed in duplicate, to Albert and John Howland, and they entered into possession of the premises. One of the notes given by White, with Minerva White as security, to Julius Keister, matured March 27, 1891, and not being paid, Minerva White gave the Howlands notice of her ownership of the note and lease, demanded payment, and in default, declared the lease terminated and demanded possession of the undivided half of the premises, etc. Payment not being made, she began this action. The Howlands claimed that because Minerva White did not surrender and deliver to them all the rent notes held by her, excepting the one on which the forfeiture was declared according to a provision of the lease to that effect, her action was not sufficient to terminate the lease and create a forfeiture. *It was held*, that the clause of the lease did not expressly provide that all of the unmatured rent notes should be surrendered in case of a forfeiture; that the notes not having been given by the Howlands, they had no right to them, and were under no obligation to pay them if they were not delivered up. *Howland et al. v. White*, 236

LARCENY.

Imputation of, Not Always Actionable.—One who has lost property

LARCENY. *Continued.*

by theft or trespass, may, in good faith and without malice, recite the facts and circumstances connected with such loss, though the guilt of another is thereby indicated, without subjecting himself to an action of slander, if he expresses no opinion and makes or intimates no charge as to the guilt of another. *Halsey v. Stillman*, 413

LIABILITY OF A STOCKHOLDER.

The liability of a stockholder is regarded as primary, and he must make good the unpaid balance due the depositors, regardless of what may be realized from the corporate assets. *Palmer v. Wood*, 630

LIEN.

Deficiency—Lien for Rents and Profits During the Statutory Period Allowed for Redemption.—When the rents and profits of the land, as well as the land itself, are pledged by a mortgage for the amount due the mortgagee by the appointment of a receiver, he has an equitable lien upon such rents and profits during the statutory period allowed for redemption of the full payment of any deficiency that may arise upon a sale of the premises to pay the debt. *Oakford v. Robinson*, 270

LIMITATIONS.

Administrator's Bond—Statute of Limitations.—In an action by the heirs of a deceased person against the administrator, and the sureties upon his official bond, it appeared that the bond was given in 1865, and that in 1872 the administrator made a report showing a balance in his hands of \$1,228.50, which was approved by the court, and distribution ordered. The administrator paid out, accordingly, to all the heirs a part of their shares, and all except two in full; that no further step was taken until October, 1891, when the administrator presented his final report and asked to be discharged, objections being filed, etc. The County Court found a balance remaining in his hands, and ordered him to pay over the same in thirty days. This he declined to do, and a suit upon his bond was the result. On the question whether an action could be maintained upon the bond for an account of moneys collected, but not reported, prior to the report of 1872, *it was held* that it could not, more than sixteen years, the statutory period of limitations, having elapsed since the making of the report in 1871. *The People, etc., use of, etc., v. Ochiltree et al.*, 220

Statute of Limitations—Burden of—Proof—Instructions.—Where, to a declaration on a promissory note, the defendant pleaded the statute of limitations, and the plaintiff replied that a payment had been made within the statutory period, an instruction which advises the jury that the burden of proof upon the issue made by a plea of the statute of limitations is upon the defendant, to show that the suit was not commenced within ten years after the action occurred, is erroneous. By the state of the pleadings, the plaintiff, by his replication, admits that the action was barred, unless saved by reason of the payment which he maintained the defendant had made upon the note. *Simmons v. Nelson*, 520

LIMITATIONS IN CHANCERY, 630.

Burden of Proof under Plea Traversed.—Under a plea of the statute of limitations, traversed, the burden of proof is upon the defendant. *Haines v. Amerine*, 570

Exemption of Trusts.—The doctrine of exemption of trusts from the operation of the statute of limitations is not recognized in proceedings at law. Strictly speaking, a trust, in its technical sense, is known only in equity, and to exempt it from the bar of the statute it must be of the kind belonging exclusively to the jurisdiction of equity. Whenever a so-called trust matter is cognizable at law, it is not withdrawn from the operation of the statute, but is subject thereto. *The People v. Ochiltree*, 220

Limitations under By-Laws—Waiver.—Where the by-laws of a benefit life association provided that—"In any suit, proceeding or action, brought upon a certificate of membership or claim thereunder, after the expiration of one year next after the death of the member, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced, any statute of limitations of any state or government to the contrary notwithstanding"—and pending a negotiation in regard to the settlement of a claim, if the action of the association is such as to create in the mind of the claimant a reasonable hope that an adjustment would be made and thereby deter him from bringing his suit, the association will be estopped from interposing the defense of the limitation, because it had by its own course misled the claimant by inducing him to believe that his claim would be settled. *Mutual Benefit Life Ass'n v. Coats*, 185

LITIGANTS.

Non-resident Litigants—Resident Garnishees—Rights of Creditor.—Where the plaintiff and defendant in an attachment proceeding are non-resident, the fact that persons indebted to the defendant, and summoned as garnishees, are residents, does not change the situation. The right to collect the amounts due from such persons as debtors, pertains to, and follows, the creditors, and the *situs* of the property held by the creditor is the residence of the creditor. *Consolidated Tank Line Co. v. Collier*, 529

LOSSES.

How Ascertained, etc.—The losses for which stockholders in these corporations are liable, are not to be ascertained by deducting the assets of the corporation from the claims of the depositors, but the latter may seek from the stockholders full payment of whatever is due from the corporation. *Palmer v. Wood*, 630

LOSSES AND PROFITS, 649.

LOSS OF SERVICE.

Constituents of the Action.—Loss of service is theoretically necessary to support an action for seduction, but only slight evidence of such loss is required, for the reason that the loss of the comfort and society of the daughter and honor of the father and the family are the real constituents of the action. *Bayles v. Burgard*, 371

MALICE.

Implied at Common Law.—Malice is implied at common law from the speaking of actionable words, and general damages follow as a legal inference. *Colby v. McGee*, 294

Implied under Statutes, etc.—Malice is likewise to be implied from the speaking of words made actionable by statute. The effect of the statute is to increase the number of actionable words from all of which malice is to be alike implied, and recovery allowed, without proof of special damages. *Colby v. McGee*, 294

MANDAMUS.

Proceedings.—In mandamus proceedings the relator must show a clear legal right to the relief prayed. *The People v. Village of Chappin*, 643

MASTER IN CHANCERY. *Exception to Report*, 562.

Master and Servant.—The mere relation of master and servant can never imply an obligation on the part of the master to take more care of a servant than he may reasonably be presumed to take of himself, and so where defects in machinery or other appliances are as well known to the servant as to the master, the servant must be regarded as voluntarily incurring the risk resulting from its use, unless the master, by urging on the servant, or coercing him into danger, or in some other way, directly contributes to the injury. *P. D. & E. Ry. Co. v. Hardwick*, 562

Railroad Employes.—It is a familiar doctrine in this State that an employe must be careful to note and report any defects or want of repair in the appliances which he is required to use. If the employer uses reasonable care to furnish safe and suitable appliances, he may expect his employe will promptly call attention to any defects that may appear or of any repairs that may become necessary, so far as due care on his part will discover the same, and an employe who fails in this respect does not exercise ordinary care for his own safety. *Peoria, Decatur & Evansville Ry. Co. v. Hardwick*, 562

Conflicting Rules—Negligence.—The rules of a railroad company required the brakemen to be on top of the train when approaching a station, and also forbade their being on top of very high cars when approaching bridges and viaducts. In the case at bar, it happened that the train contained a high car and the viaduct was near the station, and while the brakeman was, under one rule, required to be on top of the train, it was his duty, under the other, to avoid the high cars as he neared the viaduct. There were no lights and the night was dark. The court said there was a narrow line between his duty to his employers and a proper regard for his own safety, and held, that if the company so arranged matters by allowing a viaduct at a point where a brakeman was required to be on top of the train, and by admitting into the train a car too high to pass safely under the viaduct, with a brakeman standing upon it, and by providing no light or other warning, that it became necessary for the brakeman to incur some risk in performing his duty, and if he, in this seeming conflict between his duty and his safety, used rea-

MASTER IN CHANCERY. *Continued.*

sonable care and judgment, exercising such caution as a reasonably prudent man would, ordinarily, under like circumstances, then the company ought to compensate him for the injury he received. *C. & A. R. R. Co. v. Mathews*, 561

Relative Duties—Instructions.—It is error to instruct the jury that the master's duty is absolute, that he must furnish reasonably safe machinery and keep the tracks in reasonable repair, making him the insurer to that extent, when it is well settled that he is bound only to use due and reasonable care to that end. *P., D. & E. Ry. Co. v. Hardwick*, 562

Risks Assumed by the Servant—Extra Risks.—It devolves upon the master to prepare the appliances and machinery to be used in and about the business engaged in, with such reasonable care that the servant will not be exposed to perils beyond such as pertain to the work. Extra risks resulting from a failure of the master to discharge this duty do not come within the danger assumed by a servant. *Consolidated Coal Co., of St. Louis v. Hænni*, 115

Notice of Defects.—Where appliances are contrived and constructed for temporary use without the assistance or knowledge of the employe, not in his care or control, he never having operated them or had an opportunity to inspect them, the employe is not chargeable with notice of their defects, either in plan or construction. *Consolidated Coal Co. v. Hænni*, 115

MATRIMONIAL RIGHTS.

Sale of Property in Fraud of.—A husband owned property on the 26th day of November, when he and his wife separated. The husband had a brother living in Kansas. On the 3d day of December he arrived at the home of the husband and purchased all of his property except "cash in hand and promissory notes" for \$5,000, paying \$1,000, and giving his note for the balance: *held*, that the sale was only colorable, and that both parties entered into it with the fraudulent intent and purpose of reserving the property beyond the reach of the wife and of preventing its application under the statute to her use and benefit and that of her child. *Bear v. Bear*, 327

Measure of Proof in Slander, 331.

MECHANIC'S LIENS.

Filing Statement.—On the question as to whether section 4 of the Mechanic's Lien Law as amended in 1887 (Laws 1887, 219), providing for the filing of a statement of his claim by a person claiming a lien, is an essential condition of his right to file his petition, or applies only as between the lien claimant and other creditors, or incumbrancer or purchaser, and not as between such claimant and the debtor, the inclination of the court is that it is an essential condition of the right to bring a suit for a lien, etc. *Shinn v. Matheny*, 135

MORTGAGE. *Given to Secure Bonds—Parties*, 497.

Power to Appoint a Receiver on Default.—Where a mortgage provides for the payment of taxes and insurance of the buildings upon the premises, and, in case of a default, for the appointment of a

MORTGAGE. Continued.

receiver to collect rents, etc., during the pendency of foreclosure proceedings, *it is held* that a non-compliance with these provisions empowered the mortgagees to declare the indebtedness due, though not due by the tenor of the notes, to secure the payment of which the mortgage was given, and to procure, through the medium of a receiver, to be appointed by the court, possession of the premises, and the application of the rents to the payment of such indebtedness. The courts of this state are vested with ample power and jurisdiction to enforce such contracts. *Niccolls v. Peninsular Stove Company*, 317

MORTGAGE FORECLOSURE.

Prior and Subsequent Mortgagees — Parties. — When a prior mortgagee is made a party to a foreclosure suit by a second mortgagee, there should be a distinct allegation in the bill, of the purpose for which prior mortgagee is brought in, and if it is intended to assert the invalidity of the prior mortgage, or that for any reason it should be subordinated to the second mortgage, there should be an averment of the facts relied upon, so that an issue may be made up on the pleadings. Under the general allegation that a party has, or claims to have, some interest in the mortgaged premises or some part thereof, as purchasers, mortgagees, or otherwise, which interests, if any, accrued subsequent to the lien of the complainant's mortgage, the party holding the prior mortgage is not bound to set up his rights in respect thereto, and is not affected by a decree taken *pro confesso* against him. *Foral v. Benton*, 638

In Chancery—Parties.—A person holding an unrecorded deed of mortgaged premises and not being in possession, can not complain because he is not made a party defendant in foreclosure proceedings. *Oakford et al. v. Robinson*, 270

Effect of the Mortgagee's Default at Common Law.—Under the common law, a default in the performance of the conditions of a defeasance worked an absolute forfeiture of the estate, but in equity a mortgage was only regarded as a security for the indebtedness, and a right of redemption after a default was established. *Phelan v. Iona Savings Bk.*, 171

Mortgagee's Right to Rents.—The right of a mortgagee to rents secured by a mortgage can not be contracted away by the mortgagor. *Niccolls v. Peninsular Stove Co.*, 317

MUNICIPAL CORPORATIONS.

Liability for Costs in Quasi Criminal Proceedings.—Sec. 40, Ch. 53, R. S., providing that in all criminal cases where the fees can not be collected of the party convicted, or where the prosecution fails, the county may, in its discretion, direct that the costs of the prosecution, or so much thereof as shall seem just and equitable, shall be paid out of the county treasury, provided that the costs in criminal and *quasi* criminal prosecutions for the violation of ordinances of an incorporated town or city, when the provisions of the charters of such towns or cities do not prohibit the payment of such costs, may

MUNICIPAL CORPORATIONS. *Continued.*

be paid by such city or town in the discretion of the city council or board of trustees of such incorporated cities or towns, applies to suits originally commenced in the Circuit Courts, as well as to those commenced before justices of the peace, and taken there by appeal. *The People v. Village of Chapin,* 643

Not Liable for Costs.—Where a city or town is suing to enforce its ordinances, it is performing a public function just as the State is when prosecuting by indictment or information; the payment of costs in such proceedings being discretionary, such city or town can not be compelled to do so by mandamus. *The People v. Village of Chapin,* 643

NATIONAL BANKS.

Incidental Powers of the Directors.—The incidental powers of the directors of a national bank are such as are necessary to the efficient exercise of the express powers. A donation of the sum of \$500 of the funds of the bank, to induce a manufacturing company to remain in the town where such bank is located, is unauthorized and illegal. *McCrary v. Chambers,* 445

Right to Make Donations of Money.—The right to make donations of money is not among the chartered powers of a national bank. The directors can use the funds and property of the bank only for proper banking purposes and for the strict furtherance of the business objects and financial prosperity of the corporation. *McCrary et al. v. Chambers et al.,* 445

Use of Funds for Charity, etc.—The directors of a national bank can not use any portion of the money of the bank for objects of usefulness or charity, or the like, however worthy of encouragement or aid. They can not make gifts from the corporate funds. *McCrary v. Chambers,* 445

NEGLIGENCE.

A Question of Fact—Exception.—It may be regarded as settled in this State that as a rule negligence, contributory or other, and whether the facts be admitted or proved, is a question of fact. The omission of a duty enjoined, or commission of an act forbidden, by a statute, are recognized exceptions, and so is an act which at once strikes the minds of men in general as desperate or plainly reckless, like jumping from a train moving at the rate of fifty miles an hour. *C. & A. R. R. Co. v. Byrum,* 41

Injuries to Domestic Animals, 251.

Railroad Company—Inconsistent Rules.—A railroad company had two rules, one requiring the brakemen to be on top of the train when approaching a station, so as to keep the train under control, and one forbidding the brakemen from being on top of unusually high cars when approaching bridges and viaducts. *It was held* that an instruction advising the jury that these rules were not in conflict and that they must be construed together, was properly given. *Chicago & Alton Railroad Company v. Matthews,* 361

Plaintiff Must Be in the Exercise of Ordinary Care.—In an action

NEGLIGENCE. *Continued.*

for personal injuries, it is incumbent upon the plaintiff to show that at the time, etc., he was himself in the exercise of ordinary care.

Fulton County Narrow Gauge Ry. Co. v. Butler, 301

Ordinary Care, etc.—When a person, for reasons peculiar to herself, must be more prudent and use greater care than would be required of others, such greater care becomes only ordinary care in the meaning of the law. *Smith v. City of Cairo*, 166

NEW TRIAL.

A new trial will not be granted upon the ground of newly discovered evidence where the evidence, if heard, would not be conclusive or decisive, but merely cumulative. *Halsey v. Stillman*, 413

NOTICE. *Judgment*, 253.

NUISANCES.

Distinct Damages.—If the principle that a person can not recover for damages resulting from the offensive discharge from a sewer, unless it appears that he has suffered damage different and distinct from that sustained by the general public, is conceded to be in the abstract correct, it has no application to a case where sewage is discharged in the immediate vicinity of the plaintiff's dwelling, and the effluvia permeates his dwelling, nauseating and sickening its inmates. Such an injury, and the consequent damages, are special to the plaintiff, and entirely distinct from what the public may have suffered in a general way from the same cause. *City of Jacksonville v. Doan*, 247

Instructions, 247.

When a Permanent Source of Injury.—A nuisance which may be abated by law is not regarded as a permanent source of injury, but as a continuing source, and successive actions for damages occasioned by it may be maintained from time to time as such damages are inflicted. *Baker v. Leka*, 353

OFFICER.

Failing to Give a New Surety.—Under Chapter 103, R. S., when an officer fails to give a new bond, his duty is to turn over to his sureties all books, moneys, vouchers, papers and every description of property pertaining to his office, and the sureties may enforce their rights in this respect by an action of replevin. It is within their power to proceed against him by *quo warranto* or by *mandamus* to require the proper authorities to call an election, etc. *Hewes v. The People*, 439

Holding Over—Sureties.—When an officer holds over after the expiration of his term, no successor having been elected and qualified, the liability of sureties upon his bond will extend beyond the term for a reasonably sufficient time, within which the successor may qualify. *Hewes v. The People*, 439

Term of Office Closed upon a Contingency—Sureties.—Because a certain contingency brings the term of an office to a close, and cuts off or terminates the legal right of the incumbent to perform the acts pertaining to the office, it does not follow that as to the public, his

OFFICER. *Continued.*

acts are to be discredited or that his sureties are released when his legal right to fill the office has ended. He may be treated as an officer *de facto*. Being such, his acts are valid, not only as against, but also in favor of, third persons; so held where a constable, being required under chapter 103, R. S., to give a new bond, failed to do so, but continued to act. *Hewes et al. v. The People, etc., for use, etc.,* 439

Liability of, 2 2.

ORDER OF PROOFS.

The order in which competent evidence shall be received is largely in the discretion of the court, and not subject to review except where the discretion is clearly abused. *Bussey v. Hemp et al.,* 195

ORDINANCES.

Partly Valid and Partly Invalid.—An ordinance can not be valid in part and in part invalid so that the court can reject the invalid portion and support the residue. *McGregor v. Village of Lovington,* 211

Void as Against Public Policy, 211.

PARTIES. *Foreclosure in Chancery, 270; Mortgage Foreclosure, 638.*

Mortgage Given to Secure Bonds.—The rule is well settled that where a mortgage is given to secure bonds, which are negotiable by delivering, the trustee named in the mortgage is to be deemed the representative of the bondholders, and may litigate in their behalf. They are not necessary parties whether the trustee is complainant or defendant, or whether the mortgage is a prior or subsequent incumbrance; it is sufficient if the trustee is a party. The general rule that all persons who have an interest in the controversy must be made parties, has an exception in such a case. *St. Louis & Peoria R. R. Co. v. Kerr et al.,* 496

Persons in Interest Not Always Necessary.—In a suit against the stockholders of an insolvent corporation, it is not necessary that all the stockholders should be made parties. The rules and practice which might well apply to different cases, requiring all persons interested to be brought in, do not apply to cases of this kind. *Palmer v. Wood,* 630

Power of One Partner to Bind the Firm by Deed.—The rule of law in force in this State is that partners can not bind the firm by deed, and ordinarily, a partner, in making and signing such an instrument of writing in the firm name, binds himself only, and not the firm.

Previous Parol Assent.—It is the rule in this State that, if the other partners give their parol assent previous to the execution of a writing that it should be under seal, it will bind them though they are absent when it is signed. *Edwards v. Dillon,* 475

Rights of Parties not Joining in the Appeal.—As a party not having appealed, can assign no error, so parties who have appealed, can assign no error which affects only the rights of the parties not appealing. *St. L. & P. R. R. Co. v. Kerr,* 496

PARTIES. *Continued.*

In Chancery—Adjudication under Void Order.—Where persons come into court, under a notice and order of the court requiring all creditors of a defunct banking institution, having claims similar to those of the complainants in the suit, to appear and manifest their demands, and subsequently the court set aside the order, as having been illegally entered, and dismissed the parties brought in under it, *it was held* that there was no adjudication as to the claims held by these parties. They came in under one order of the court and retired under another, holding the former one to have been inadvertently made, and were left in *statu quo*, the same as if their names had never appeared in the case. *Palmer v. Wool*, 630

Trustees, etc.—Capacity in which He Acts, 198.

Want of Proper Parties in Chancery Proceedings.—A defendant in a chancery proceeding, after answer and trial, without objection, can not complain of the omission of a party which does not prejudice him. *Webb v. Hollenbeck*, 514

Calling His Adversary as a Witness, Not Concluded by His Testimony.—Where, in a proceeding by a creditor's bill, the complainants called the defendants and put them upon the stand as their witnesses, the complainants are not concluded by their testimony, nor is the court bound to accept it as absolutely true. *Rindskoph v. Kuder*, 834

PARTNERSHIP. *Contract—Seal, When Surplusage*, 475.

Existence of, etc.—Losses and Profits.—The principle to be collected from the authorities appears to be that a partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating, or being interested in the profits of a business, but that the existence of a partnership implies also the existence of such a relation between the parties, as that each of them is a principal, and each an agent of the other. *State Nat. Bk. v. Butler*, 648

Power of One Partner to Bind the Firm by Deed, 475.

When it Exists—Sharing of Losses and Profits.—The fact of sharing of losses and profits, spoken of in the books, is an important, if not a controlling, test in determining whether a partnership exists, but it is not infallible; it is subject to qualifications. (1) It must be a sharing in the profits, as distinguished from merely making the profits, the measure of compensation for services, or for the use of property, or money in the business. (2) There must not only be a sharing in the profits, but it must be done as a principal, and not merely as an employe, or as interest on a loan of money or for the use of property. *State Nat. Bk. v. Butler*, 648

Partnership Funds.—A partnership caused a sum of money to be deposited in the National Live Stock Bank, of Chicago, to the credit of the Bank of Arthur, for its (said partnership) account. The last named bank placed the amount to the individual credit of one of the members of the firm, and paid the money out on his check. In a suit by the firm to recover the money, the trial court refused to hold three propositions of law, viz:

PARTNERSHIP. *Continued.*

(1.) If the court believe from the evidence that plaintiffs, Ellars & Humble, caused funds belonging to them to come into possession of defendant, and that said Ellars & Humble did not want a firm account opened with the bank, but desired to have the funds placed to the credit of one or the other of the members of said firm, and that such firm funds had been placed prior to the transaction complained of, and that such disposition thereof had been acquiesced in by said firm, and if the court further believe from the evidence that the money in controversy was money belonging to said firm, and was placed by defendant to the credit of Humble, either with or without the special direction of the firm, or either of them, but in accordance with a method of doing business before that time acquiesced in by said firm, and that said money was paid to said Humble on his individual check after having been placed to his account—then the judgment in this case ought to be for defendant.

(2.) The placing of partnership funds coming into the possession of a bank to the credit of one of the members of the firm when the firm has no firm account with such bank, and desires not to have one, and payment to said member of said funds on his individual check, is payment to the firm.

(3.) If the court believes from the evidence that defendant received the money in controversy as funds belonging to the firm of Ellars & Humble, and paid the same to Humble as a member of said firm, then the plaintiffs, Ellars & Humble, can not maintain a suit at law in the firm name, although the court may believe from the evidence, as between Ellars and Humble, Humble had no right to receive said money.

It was held, that if the consent of Ellars be not implied, the payment was good as to Humble, and being a complete satisfaction as to one of the parties, a court of equity is alone competent to grant the relief which the firm seeks by this action of assumpsit. The holding was incorrect, as the evidence tended strongly to support the propositions. *Bank of Arthur v. Ellars & Humble*, 598

Scope of the Patent Laws.—The patentability and scope of the invention, the validity of the patent, the right of the patentee to forbid others to employ, or use it without his consent, are matters within the scope of the patent laws. But controversies in regard to its authorized use by another. are matters with which the patent laws have no concern. *Havana Press Drill Co. v. Ashurst*, 454

PATENT LAWS.

Jurisdiction of the Federal Courts.—The Federal courts have exclusive jurisdiction of all cases under the patent laws. The purpose of the patent laws is to create and preserve a monopoly in the invention, in favor of the patentee, but the Federal courts have no concern with the mode or extent of the enjoyment of the monopoly by the patentee. His right in the patented invention is considered as an article of property, and his contracts with others as to its ownership or enjoyment, do not concern the existence of the monopoly. *Havana Press Drill Co. et al. v. Ashurst et al.*, 454

PATENT LAWS. *Continued.*

Contests Relating to Property in Patent Rights.—A controversy as to such property, or contract right, is not a case under the patent laws, but may be determined by courts having ordinary jurisdiction over such subjects. *Havana Drill Press Co. v. Ashurst*, 454

PAYMENT. *Possession, When a Presumption*, 158.

PERSONAL INJURIES.

Care and Diligence.—A person afflicted with physical disabilities to a degree impairing his power of locomotion must be held to the duty of exercising a degree of care commensurate with and proportionate with her known infirmities and inabilities to observe obstacles in her path and pursue her way in safety. *Smith v. City of Cairo*, 166

Evidence of Other Accidents—Changed Conditions.—A person was fatally injured at a public fountain, as was claimed, by reason of its defective construction. His administrator was allowed to prove the occurrence of other accidents at the same place without showing that the fountain was in the same condition as it was when the deceased was injured, it appearing that a change had been made in the condition of the fountain. The change consisted in removing the elbows from the ends of projecting spouts. *It was held*, that how far the removal of the elbows worked a material and substantial change in the condition of the fountain was a question of fact for the jury, under proper instructions, to say whether the fountain continued dangerous after the change. *City of Bloomington v. Legg*, 459

PERSONAL PROPERTY. *Rights of Survivorship in*, 145.

PLEADINGS. *Variance Between Pleadings and Proofs*, 26.

General Issue—Breach of Contract—Recoupment.—When the defense to a suit is in the nature of a cross action, the cause of which is damages sustained by a breach of an express agreement, the defendant, upon proper proof, may recoup general damages under a plea of the general issue as well as under a special plea.

Nil Debet.—A plea of *nil debet* to a declaration in assumpsit on the common counts, being inappropriate, is a nullity, even in debts upon a simple contract. A set-off could not be proved under it without notice. *Koch & Co. v. Merk*, 24

In Assumpsit.—When the action of assumpsit is on an undertaking, which the law presumes to have been made because of certain acts, or the conduct of a party, though he has actually made no promise, the accepted form of pleading requires an averment of liability because of the acts, and of a promise which the law implies from the existence of the liability; but, when the action is brought upon an express contract to do a certain act, no allegation of an implied promise is necessary. *Keyes v. Binkert et al.*, 259

In Chancery—Pure Pleas, etc.—A pure plea, as known in chancery practice, must set up some matter not appearing on the face of the bill. *Palmer v. Wood*, 630

Innuendoes.—In an action for slander, it is a rule of pleading that

PLEADINGS. *Continued.*

while an innuendo may explain, it can not enlarge the meaning of the words alleged. *Finnell v. Walker*, 331

POSSESSION. *In Contracts of Sale*, 393; *Of Promissory Note by Maker*, 158.

PRACTICE. *Assignment of Errors by Party Not Joining in the Appeal*, 497; *Amendment of Judgment at Subsequent Term of Court*, 60.

Appeals in Drainage Proceedings, 17.

Authentication of Records.—A record of the commissioners of highways, offered in evidence for the purpose of showing authority for digging a ditch in the highway, which is not authenticated by the signature of the president of the board, as required by the statute, is not admissible. *Gillett v. Taylor*, 403

Conduct of Jury Trials.—It is to be desired that the deliberations of juries should be free from circumstances calculated to prevent a full and fair consideration of the matters committed to their decision. After a long trial it is to be expected that some or all of the jury will be fatigued, mentally as well as physically; and if, at the hour at which they and most men are accustomed to sleep, they are forced to decide a case, it will not be strange if they fail to decide it correctly. *Meeth v. Rankin Brick Co.*, 602

Determining Questions of Fact, 84; *Dismissal for Failure to File Transcript*, 24.

Exceptions to a Master's Report.—A party dissatisfied with the master's report, must present exceptions thereto and obtain a ruling of the court below upon the same from which an appeal will lie. Such exceptions can not be preferred for the first time in the Appellate Court. *Niccolls v. Peninsular Store Co.*, 317

Failure to Enter a Default.—On the trial of an action of assumpsit, the court, in the absence of a plea to the declaration, and in the absence of the defendant, without entering a default, impaneled a jury and proceeded to assess the plaintiff's damages, and upon the verdict rendered a judgment. Held, that the failure to take and enter the default was a fatal error. *Lehr v. Vandever, Administrator, etc.*, 511

Failure to Present Propositions of Law, 334.

Failure to File Briefs.—A judgment will be reversed for a failure, on the part of appellee, to file briefs as required by the rules of court. *Mullen v. Brown*, 592

Order of Proofs, 195.

Pleading—Withdrawal of a Count—Effect of, etc.—The withdrawal of a count in a declaration, though a disclaimer of all right to recover under it, does not take it out of being as a subject of reference. It can not thereafter operate *per se* as an averment of anything in the suit, but it is still in existence and a part of the same paper with the other counts.

Where the beginning of the first count of a declaration in case was

PRACTICE. *Continued.*

as follows: "In the Macoupin County Circuit Court, State of Illinois, February term, 1891, Emmett T. Rice, the plaintiff, by R. B. Shirley, his attorney, complains of the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, defendant, of a plea of trespass on the case, for that, whereas," etc., alleging that the defendant on a day mentioned, etc. And the beginning of second count was as follows: "And whereas also the said defendant before and on the day aforesaid in the county, was a railroad corporation," etc. And upon the trial the plaintiff withdrew his first count. *It was held*, that the withdrawn count was still in the case for the purpose of reference, containing as it did the statement of a certain time and place of certain alleged occurrences, and that the second count might properly, by clear reference, incorporate them in its own averment of other occurrences. *Cleveland, Cincinnati, Chicago & St. L. Ry. Co. v. Rice*, 51

Who May Assign Errors, 496.

Rule 30—Briefs and Abstracts.—If the defendant in error or appellee shall fail to file his brief in compliance with the rules, the judgment or decree will be reversed *pro forma*, unless the court, on examination of the record, shall deem it proper to decide the case on its merits. 5 Brad. 13.

Failure to File Brief.—A failure on the part of appellee to file a brief under the rules of court is cause for reversal. *Wenz v. Tirrill*, 41

Rule to File Transcript—Dismissal for Failure, etc.—The court upon its own motion ruled the plaintiff in error to present a complete transcript, properly certified, by a certain day. The only answer to the rule was the filing of several affidavits tending to show that the clerk had intrusted the work of making the transcript to the state's attorney. No effort was made to make it complete or correct. The writ was dismissed for non-compliance with the rule. *Rhodes v. The People*, 21

PRESUMPTIONS.

As to the Ruling of the Trial Court—Verdict.—The presumption of law is that the Circuit Court correctly ruled as to the law of this case, that the verdict of the jury is in harmony with the weight of the evidence, and that the judgment upon the verdict was right. *Folger v. Bishop*, 526

Blank Indorsement, 195; *In Trials by a Court*, 387.

PRINCIPAL AND SURETY. *Estoppels*, 418.**PROMISSORY NOTES.** *Right to Purchase by Security*, 237.

Indorsements—Statute of Limitations—Evidence.—An indorsement upon a promissory note, standing alone, can not be considered as evidence, where the holder of the note is endeavoring to establish a credit, for the purpose of avoiding the effect of the statute of limitations. *Simmons v. Nelson*, 520

Possession by Maker—Presumption of Payment.—Possession un-

PROMISSORY NOTES. *Continued.*

explained by the maker of a promissory note is *prima facie* evidence of payment; but when the evidence shows the circumstances, manner and means of obtaining the possession, the presumption or inference of payment, if any, must come from these and not from the mere fact of possession. If they show it was wrongfully delivered by a party to whom the payee had intrusted it for another and different purpose, such possession is no evidence of payment. *Tecter v. Poe*, 158

Transferred by Blank Indorsement, etc.—Presumption.—When the transfer of a negotiable note is made by indorsement without date and the actual time of the transfer is not proven, the presumption of law is that the note was transferred before maturity; this presumption, however, is slight and weak and may be overcome by proof. *Bussey v. Hemp*, 195

Propositions of Law—Effect of a Failure to Present.—When, in a chancery proceeding, no propositions to be held as law in the decision of the case were presented to the court below or exception taken to any ruling of the court as to the reception or rejection of evidence, the sole question for this court on appeal is, is the decree supported by the evidence. *Rindskoph v. Kuder*, 834

PUBLIC POLICY. *Void Ordinances*, 211.

PUBLICATION. *Of Words in Slander*, 435.

QUESTIONS OF FACT.

Where the evidence is conflicting, etc., this court will defer to the judgment of the chancellor, formed under better conditions, etc. *Snodgrass v. Nelson*, 121

Where a fair question of fact is submitted to the jury, appellate courts are not disposed to interfere with their conclusions. *Crone v. Bane*, 287

In Chancery.—In chancery cases, where the evidence is conflicting and witnesses have been examined orally in court, there is the same necessity existing as when there has been a trial by jury, that the error in the finding of the facts shall be clear and palpable to authorize a reversal, because the trial judge has the witnesses before him and can observe their manner and appearances, and is thus afforded facilities often of the greatest importance in determining their credibility. *Hughey v. Hughey*, 315

Verdicts—Weight of Testimony.—Whether the contention of a party litigant is sustained by the facts and circumstances is a question for the jury, and their conclusions should stand unless the court can see that they are manifestly against the weight of the evidence. *Springfield Marine Bk. v. Mitchell*, 486

RAILROAD COMPANIES.

Attorney's Fee—Action for Damages by Fire.—In an action against a railroad company for damages by fire communicated from an engine by dead grass and dry weeds negligently left on its right of way, and for an attorney's fee, as a penalty under sections 1 and 1½ of the "act in relation to fencing and operating railroads,"

RAILROAD COMPANIES. *Continued.*

approved March 31, 1874, and the amendments thereto, the court gave the following instruction to the jury: "If you find, gentlemen of the jury, from the evidence in the case, that this fire was set by a passing engine on this railroad, then of course they are liable for damage done by fire; and if the fire originated inside of the right of way on account of the right of way being in a foul condition with dead grass and dry weeds upon it, whereby the fire was started, and from that carried over to the meadow and from there to the stacks, then Mr. Anderson is entitled to receive his attorney's fee in addition to the damage he sustained, which is agreed in this case to be \$15. If the fire originated outside the right of way in the meadow, then he would not be entitled to his attorney's fee, but he would be entitled to his damage for the hay and rails. You can render the verdict, gentlemen, according to the evidence and the instruction, and bring it into court. If the court is not in session, sign and seal it and give it to the bailiff. The form of the verdict will be, 'We, the jury, find for the plaintiff and assess the damages at' so much, the amount you agree upon including the attorney's fee or not, as you may find, from the evidence, where the fire originated." *It was held*, that since 1879 the statute has imposed for the wrongs complained of as a penalty, in addition to the actual damages, a reasonable attorney's fee, and that the instruction was right. *T., St. L. & C. C. R. R. Co. v. Anderson*, 130

Accidents—Burden of Proof.—When a railway car is thrown from the track, whereby a passenger is injured, the presumption arises that the accident resulted from an imperfect condition of the track or from bad management of the trains, or both combined, and the burden of proof is upon the company to show that it was free from negligence. *Chicago, Peoria & St. L. Ry. Co. v. Lewis*, 274

Conflicting Rules, 362; *Duty of in Carrying Passengers*, 41; *Duty to Keep the Right of Way Clear from Dead Grass, etc.*, 130.

Duty Toward its Employees.—A railroad company owes to its employees the duty of using the uttermost care and vigilance consistent with the practical operation of its road in keeping its tracks in safe condition. *Chicago & Alton Railroad Co. v. Kerr*, 231

Failure to Fence Track, etc.—Cattle Guards.—An action was brought against a railroad company for killing domestic animals by a freight train at a small unincorporated village on the line of its road at which it had a station house and stopped its trains to receive and discharge freight and passengers, and where it was claimed the animals got upon the track. It was conceded that at the place in question the road had been in use for more than six years, and that it was not a place specifically excepted from the statutes, but it was contended that the company's duty to afford the public reasonable safety and despatch in the transaction of business, and provide a ready and convenient means of access to its station, authorized the company to omit the fence and cattle guards at the place in question;

RAILROAD COMPANIES. *Continued.*

it was held, that by law a railroad company was not bound to fence its depot grounds and the tracks and switches adjacent thereto in towns and villages, so far as their proper use and convenience requires that they should be left open for the transaction of its business with the public, but the question for determination from the evidence whether such use and convenience did require that places like the one in the case at bar should be left open, was one of fact, and properly left to the jury. *Toledo, St. L. & K. C. R. R. Co. v. Thompson*, 36

Right to Charge Ten Cents Extra.—A rule of a railroad company requiring passengers who fail to purchase tickets to pay ten cents in addition to the regular fare, is one which the company can lawfully enforce. *Lake Erie & Western R. R. Co. v. Quisenberry*, 338

Inconsistent Rules—Negligence, 362.

Injuries to Domestic Animals—Negligence.—In an action to recover damages for the killing of domestic animals which, escaping from the plaintiff's premises, were upon the defendant's track, it appeared that the company had fenced its track as the law required and provided a gate for the use of the plaintiff at his farm crossing. The gate was made to slide between posts at one end, but the plaintiff changed it so that it hung upon hinges, and at the time of the injury complained of, it was so fastened that stock might push it open by rubbing against it. From the plaintiff's own testimony it appeared that while the gate was closed and fastened an hour or two before the injury occurred, it was found open shortly after. This appearing, *it was held*, that the animals got upon the track through no negligence of the company, and that the plaintiff could not recover. *Chicago, Burlington & Quincy R. R. Co. v. Dannel*, 251

Injury to Stock on the Track—Engineer's Duty.—Whenever the danger of a collision between a railroad train and horses upon the track becomes apparent, whether by their coming upon the track through no fault of the company, or otherwise, it is the duty of the engineer to use whatever appropriate means he reasonably can to prevent or avoid the collision and injury. *C. C. C. & St. L. Ry. Co. v. Rice*, 51

Speed of Trains.—While the statute and the rulings of the courts may not have fixed a rate beyond which a train can be safely moved, yet it is manifest there must be a limit, and that when such limit is exceeded the law will impute negligence. What the limit is will depend on circumstances, very largely, such as the condition of the road bed, the weight and strength of the rail and the character and condition of the rolling stock. *C., P. & St. L. Ry. Co. v. Lewis*, 274

Who are Fellow-Servants, 243.

REAL PROPERTY. *Burden of Servient Proprietor*, 353.

REASONABLE CAUSE. *Desertion—Divorce*, 382.

Receipt as Evidence.—The rule of evidence as to the weight of a receipt and of the kind and amount of proof required to overcome it, applies to receipts conceded or shown to be genuine and not to such as are shown to be false or forged. *O'Bannon v. Vigus*, 84

REASONABLE CAUSE. *Continued.*

Presumption as to Signature.—The law presumes that a receipt, regularly executed, etc., as it appears when produced by the party claiming its benefit, was signed by the party sought to be charged; but where the integrity of its statement or the genuineness of the signature is the question in a civil action, it may be determined, like other questions of fact, upon a preponderance of the evidence, though the proof which is the effect of the evidence is not clear nor unmistakable. *Snodgrass v. Nelson*, 121

Weight of Evidence.—The fact that a receipt is forged or altered after its execution may be shown by a bare preponderance of the evidence. *O'Bannon v. Vigus*, 84

RECEIVER. *Power to Appoint in Foreclosure Proceedings*, 317.

Appointment of a Receiver.—The fact that the rents and profits of mortgaged premises, as well as the land itself, is pledged for the payment of the mortgaged debt, will authorize the appointment of a receiver in the discretion of the court, without regard to the solvency of the mortgagee. *Oakford v. Robinson*, 270

RECORD. *Additional Record by Amendment*, 60.RECORDS. *Authentication of*, 403.

RECORD OF PROCEEDINGS.

Recitals of Former Proceedings.—When a record of an order relied upon contains a mere recital that upon a former occasion certain proceedings were had, and when that occasion was and who was present not appearing, *it was held*, insufficient. *Gillett v. Taylor*, 403

RESCISSION OF CONTRACTS.

A rescission of a contract must be made *in toto*, and the parties to it placed in *statu quo*. So when a party used an engine from November until April following, in running a saw mill, a threshing machine, a steam wood saw and in baling hay, and notwithstanding some defect it served the party's purpose, and according to his own testimony was of considerable value and profit to him, *it was held*, that as it was not possible for him to return it to the vendor in its original condition, he could not rescind the contract. *Aultman & Co. v. Withrow*, 492

RECOUPMENT. *Breach of Contract*, 26.

Of Special Damages.—Special damages can not be recovered or recouped unless they are specially set forth in appropriate pleas, or, as a defense, come within the scope of the general issue. *Koch & Co. v. Merk*, 24

REMEDIES—CONCURRENT.

Writ of Assistance, etc.—A person entitled to the possession of lands sold under a judgment or decree, having obtained his deed, is entitled to have two concurrent remedies: (1) a writ of assistance issuing from the court rendering the judgment or decree, and (2) an action of forcible entry and detainer under the statute. *Brackensieck v. Vahle et al.*, 312

REPETITION.

Of Slandorous Words.—While, in an action of slander, the plaintiff can not make out his case by proving words spoken after the commencement of the suit, yet it is always competent to prove a repetition of the words after the beginning of the suit, for the purpose of showing malice and in aggravation of damages. *Halsey v. Stillman*, 413

RENTS. *Mortgagee's Right to*, 317; *and Profits, Lien for*, 271; *Distress for Rent*, 287.

RESERVATION. *In Conveyances*, 378; *Crops in Conveyances of Land*, 224.

By Verbal Agreement.—Reservation by a verbal agreement entered into prior to the execution of the deed, is not binding, and evidence thereof is not admissible. *Damery v. Ferguson*, 224

RIGHT OF ACTION.

Future Damages.—Whether a right of action for damages occasioned by the overflow of water in a ditch, arises upon the construction of the ditch within the meaning of the statute of limitations, depends upon whether the ditch is to be regarded as a permanent structure. If permanent, the owner may, upon its construction, institute a suit for, and recover, not only present but future damages, and such recovery will operate as a bar to all future actions by such owner, or by any one holding under or through him. *Baker v. Leka*, 353

RIGHTS. *Equitable and Legal*, 322.

RULES OF COURT. *Failure to Comply with, in Filing Briefs and Abstracts*, 41.

SALES EN MASSE.

Authorized by Trust Deed.—A decree in foreclosure absolutely requiring the premises to be sold in one body, in the absence of imperative reasons for such a course, can not be upheld, and the fact that the trust deed, upon which the proceedings are had, contains a clause authorizing a trustee in his discretion to sell the property *en masse*, can not avail to support such a decree. *Skaggs v. Kincaid*, 608

SEAL.

Partnership Contract—Surplusage.—An instrument which will be just as effective without a seal as with one for the purpose intended, and the contract in the instrument being within the power of a partner to make, and binding on the firm had the seal been omitted, the seal will not vitiate the instrument, if otherwise valid, as to all members of the firm. *Edwards v. Dillon*, 475

SECURITY.

Right to Purchase the Note.—A security on a note may lawfully purchase the note, and as a holder, keep it alive as an indemnity against loss because of her suretyship. *Howland v. White*, 226

SEDUCTION. *Constituents of the Action*, 372; *Evidence in Actions of*, 372.

SEDUCTION. *Continued.*

Relation of Master and Servant in Action for Seduction.—Where it appeared that a daughter, though an adult, had, since arriving at her majority, resided with her father as one of his family the same as when in her minority, and had since her mother's death, a period of seven years, been his housekeeper and cared for his minor children, occasionally, with her father's consent, doing washing and other housework away from their home, *it was held* that the relation of servant to her father was sufficiently shown to sustain an action for the seduction of the daughter. *Bayles v. Burgard*, 371

SERVICES RENDERED. *Implied Contract to Pay for*, 375.

SHAREHOLDERS. *Foreign Corporations*, 429.

What is Necessary to be Shown.—Only slight acts of service are necessary to create the relation of master and servant when an adult daughter resides with her father so as to enable him to maintain an action for her seduction. *Bayles v. Burgard*, 371

SIGNATURE. *Of Justice in Docket Entries*, 393.

SLANDER. *Character in*, 435.

Charge of Adultery.—Words imputing a charge of adultery are not actionable in themselves at common law, and an action for the speaking of such words could only be maintained by averring and proving special damages. *Colby v. McGee*, 294

Improper Use of Innuendoes, 351.

Imputation of Larceny—The Rule at Common Law.—The rule of common law was that it was not actionable to say one stole what would be fixtures to real estate. The reason for the rule was that real estate could not be the subject of larceny. Sec. 175, Chap 38, R. S. Ill., provides that if one, by trespass, with intent to steal, takes and carries away anything which is parcel of the realty, he shall be guilty of larceny, the same as if the property taken were personal property. The reason for the common law rule no longer exists, and the rule itself fails with the reason upon which it is based. *Halsey v. Stillman*, 413

Malice Implied at Common Law, 294; *Malice Implied under Statutes*, 294; *Measure of Proof in*, 331.

Publication of the Words Complained of.—If the persons in whose presence and hearing slanderous words are spoken, do not understand their meaning and do not repeat them to others, there is no such publication of the words as will support an action for slander. *Sullivan v. Sullivan*, 435

SOLICITOR'S FEES.

Where solicitor's fees are provided for in a mortgage in the event of foreclosure, it is not error to include the amount specified as costs, in the decree. *Wright v. Jacksonville Benefit Bldg. Ass'n*, 505

SPECIAL FINDINGS.

Effect in Determining Influence of Erroneous Instructions.—In determining the effect of an instruction, which erroneously shifts the burden of proof in a suit at law, recourse may be had to special find-

SPECIAL FINDINGS. *Continued.*

ings. So where, in an action of assumpsit, the defendant pleaded the statute of limitations, and the plaintiff replied a payment, the court erroneously instructed the jury that the burden of showing that the action did not accrue within the statutory period (a matter admitted by the replication) was upon the defendant. The jury found specially in answer to an interrogatory propounded by the defendant himself, that the suit was not brought within the statutory period. *It was held*, that by such a finding it is absolutely known, the imposition of the burden of proof improperly upon the defendant by the instruction did not prevent him from prevailing upon that issue. *Simmons v. Nelson*, 520

Erroneous Instructions.—Where it appears from the answers to special interrogatories that an instruction, erroneously given, has in no wise prejudiced the party complaining, the judgment will not be reversed. *Simmons v. Nelson*, 520

SPECIAL INTERROGATORY.

Refusal to Submit.—It is not error to refuse to submit a special interrogatory which does not call for an ultimate fact, upon which the rights of the parties are dependent, such as call for probative facts, which may more or less tend to settle the ultimate facts, that is, for statements of the evidence; interrogatories of the character are not such as the statute contemplates. *Lloyd v. Kelly*, 554

Answer to Special Interrogatories—Waiver.—When a more definite answer than the one given by the jury to a special interrogatory is desired, a motion to send the jury back to their room for that purpose is proper. The matter is waived by taking no objection to the answer. *Lloyd v. Kelly*, 554

STATUTES.

Construction of Statutes—Director's Liability—Assent Defined.—Under Sec. 16, Ch. 32, R. S., providing that if the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers assenting thereto shall be personally liable, etc., *it was held*, that to constitute an assent there must be a mental act on the part of the director or officer based upon some information or perception of facts. A mere failure to know or to take the steps, which, if taken, would bring the facts to light, will not suffice. *Lewis et al. v. Montgomery et al.*, 282

Construction.—Section 14 of the act in relation to fencing and operating railroads, approved March 31, 1874, declaring it to be the duty of all railroad corporations to keep their right of way clear from all dead grass, dry weeds or other dangerous combustible material, and for neglect shall be liable to all the penalties named in section 1 of the same act, requiring them in the cases and with exceptions specified to erect and construct the cattle guards to prevent live stock from getting on the road, the penalty therein named for neglect to do so being a liability to the amount of damages done by their agents or cars to stock, and reasonable attorney fees in any court wherein suit is brought for such damages were imposed, *held*,

STATUTES. *Continued.*

that the attorney fees were imposed as a penalty for the destruction of inanimate property by fire, occasioned by dry grass, etc., being left upon its track, in addition to the actual damage. *Toledo, St. L. & K. C. R. R. Co. v. Anderson*, 130

STATUTE OF FRAUDS.

Where a person agreed with another to take and break a pair of mules, for which he was to have use of them for a year, when he was about to take them away it was thought they would not lead behind his buggy, so he left and came back for them the next Saturday. It was claimed that as he did not get possession of the mules for several days after the contract was made, it was not to be performed within a year, and so void under the statute of frauds, but *it was held*, that there was no evidence tending to show that by the terms of the agreement the year was to commence at a future day, but rather that it commenced presently, for the party intended and proposed to take the mules immediately, his right to do so under the agreement not being questioned. *Sprague et al. v. Foster*, 140

STATUTE OF LIMITATIONS.

In Chancery.—When the objection that the statutory period has elapsed appears on the face of the bill, a demurrer will lie; but if it does not so appear, a plea of the statutory bar will be proper. *Palmer v. Wood*, 630

STATUTES OF LIMITATION. *Administrator's Bond*, 220; *Ditches, When Permanent Structures*, 354.

Administrator of Deceased Stockholder—Plea of, by.—The administrator of a deceased stockholder may successfully plead the statutory limitation of two years as to the estate in his hands to be administered upon. *Palmer v. Wood*, 630

STOCK.

Transfer of Stock in an Insolvent Corporation.—When there is sufficient in the proof to warrant the conclusion that a transfer of stock is merely colorable, and for the distinct and fraudulent purpose of avoiding a liability as a stockholder, a finding to that effect will not be disturbed. *Tuttle v. Nat. Bk. of Republic*, 481

Liability of Stockholders in a Corporation of Another State.—In questions touching the liability of persons holding stock in a bank of another State, for the debts of the bank in case of its insolvency, the courts of this State will follow the construction placed by the courts of the State where the bank is located, upon the constitution and statute under which the bank is organized. *Tuttle v. National Bank of Republic*, 481

SUB-CONTRACTOR. *Contractor's Lien*, 497; *Lien Against Railroads—Interest*, 497.

Subrogation—Equitable and Legal Rights.—While it is true that a surety may be subrogated to the rights of a creditor in reference to any collateral security which the creditor may hold, and that he may be subrogated to the creditor in the judgment for the purpose of

SUB-CONTRACTOR. *Continued.*

keeping it alive and enforcing it for his own benefit against his co-defendants, yet this doctrine, being one of mere equity and benevolence, will not be enforced at the expense of legal rights. *Schmitt v. Henneberry et al.*, 822; *Baker v. Leka*, 353

SURETIES.

Official Bonds—Liability as to Third Persons.—As the sureties have, by signing an official bond, enabled a person to possess a public office and exercise its functions, and as they have various means under the statute by which to divest the party of his official power, in case of malfeasance on the part of the person holding the office, as between his sureties and an innocent third party, they ought to bear the burden of his official malfeasance. *Hewes v. The People*, 439

Officer Failing to Give New Security, 439; *Officer Holding Over*, 439.

SURVIVORSHIP.

In Personal Property.—The common law rule of survivorship in respect to personal property jointly owned, has been abolished in this State by statutory provisions, in force since January 13, 1821. *Bradford, Administrator, etc., v. Bennett et al.*, 145

SIGNS.

Explanation of Arbitrary Signs in Account Books.—It is error to refuse to permit a party to explain the use of signs and peculiar forms of entry appearing in account books admitted in evidence. *Singer Manufacturing Co. v. Leeds*, 297

TENDER.

Where, under the terms of a contract for the sale of real estate, payments were to be made, not to the owner of the land but to a trustee named in the contract, *it was held* that it would be proper for the trustee to make the tender of the deed. The payment of the money and the delivery of the deed being concurrent acts, it would, of course, be expected that the person who is to receive the money should be ready to furnish the deed, though it had to be executed necessarily by the owner of the land. *Smith v. Davis*, 198

TESTIMONY AND EVIDENCE.

There is a technical difference between the testimony and evidence; strictly speaking the former relates only to the statement made by a witness under oath or affirmation, while the latter includes all that may be submitted to a jury, whether it be the statement of witnesses or contents of papers, documents or records, or the inspection of whatever the jury may be permitted to examine and consider during the trial. However, in the ordinary use of these terms they are often, if not usually, treated as synonymous, and properly so, according to standard lexicographers. *Jones v. Gregory*, 228

TESTIMONY.

In Anticipation of a Defense.—It is not reversible error to permit

TESTIMONY. *Continued.*

a plaintiff to testify to matters in anticipation of a defense, especially so, where, after the defense is developed, the evidence becomes proper. *Lloyd v. Kelly*, 554

Weight of, 486.

TOBACCO. *Use of, Implies a Fixed Habit*, 347.

The Moderate Use of Tobacco Implies a Fixed Habit.—Ordinarily the moderate use of tobacco implies a fixed habit. As a rule the system does not readily tolerate and it is only after repeated trials that one can moderately use it. Hence a habit more or less fixed is implied from the statement of moderate use. *A. O. U. W. v. Belcham*, 346

Trial by the Court—Presumptions.—When a cause is tried by the court the presumption is that only proper evidence was considered, and in such case the admission of improper evidence will not warrant a reversal if there is sufficient evidence to support the judgment. *Dorsey v. Williams*, 386

TRUSTEES. *Appointment of*, 198; *Duty of*, 283; *Liability—Assent Defined*, 283.ULTRA VIRES. *Right of National Bank to Make Donations of Money*, 445.

VARIANCE.

Copy Filed and Note Offered in Evidence.—Where the note offered in evidence agreed with the copy filed with the declaration in date, names of parties, amount, time of maturity and rate of interest in substance and legal effect, *it was held* that such verbal differences were too immaterial to support an objection to its admission as evidence on the ground of a variance. *Teeter v. Poe*, 158

Pleadings and Proof.—An objection to a judgment on the ground of variance between the declaration and the proofs, where made for the first time in the Appellate Court, if not interposed to the admission of the evidence nor among the reasons assigned in writing in support of a new trial, it must be considered as waived. Had the objections been specifically made at any time before judgment it could have been obviated in a few moments by an amendment of the declaration; but having submitted the case to the jury without so making it, and taken the chances of a favorable verdict, a party can not be heard to urge it in the Appellate Court. *Chicago & Alton R. R. Co. v. Byrum*, 41

Pleadings and Proofs.—Evidence of an agreement to ship as soon as possible or within a reasonable time will not support an averment of an agreement to ship in two days. *Koch & Co. v. Merk*, 26

VENUE.

Change of Venue—Waiver.—When the venue in a civil proceeding is changed and the cause is sent for trial to a county outside of the judicial circuit in which it arose, and no exception is taken to the order granting the change in the county where it is entered, nor a motion made in the county to which it is sent, and the party goes to

VENUE. *Continued.*

trial without objection, whatever error there may have been in the order of the court changing the venue is waived. *C., P. & St. L. Ry. Co. v. Letois,* 274

VERDICTS.

A verdict may be delivered in writing or orally, but in neither form does it become the verdict until it is announced and received in court. Until then the jury may change it or authorize the judge or clerk to change it in form or substance, and if, before it is received, the change intended is so announced by them and made in accordance therewith and recorded, the one so recorded is the only verdict in the case. *Wells et al., Executors, etc. v. Ipperson,* 580

Against the Preponderance of the Evidence.—Where the evidence is conflicting, and the jury choose to accept the version of one party, the court will not ordinarily reverse the finding. *Phenix Insurance Co. v. Woland,* 535

Against the Greater Weight of the Evidence.—Where, in an action for personal injuries, caused by the sudden stopping of a train upon which the plaintiff was a passenger, the allegations of the declaration were supported by the testimony of the plaintiff and her niece, and directly contradicted by testimony of the conductor, engineer and fireman of the train, and also by two other persons who were passengers and in the same coach with the plaintiff at the time she received the injury complained of, it was held that the jury was not warranted in finding that the injury was caused by the sudden and improper stopping of the train. *C. & A. R. R. Co. v. Means,* 394

Against the Weight of Testimony.—Where the evidence fails to show that the injury in question was occasioned by the failure of the defendant to discharge its duty toward the plaintiff as an employe in respect to matters alleged in the declaration, there can be no recovery. *Starne Coal Co. v. Ryan,* 216

Against the Weight of the Testimony.—A verdict against the preponderance of the evidence set aside. *Coates v. Mernin,* 466

Against the Weight of Evidence.—Where the plaintiff alleges certain facts in his declaration as the grounds of the negligence complained of, in order to recover, he must prove the said allegations by a preponderance of the evidence. *Fulton County Narrow Gauge Ry. Co. v. Butler,* 301

Conflicting Testimony.—Where the evidence is conflicting and the jury find a certain way, if there was evidence enough to support their finding it will not be disturbed. *C. C. C. & St. L. Ry. Co. v. Rice,* 51

Objections to Form.—Objections to the form of the verdict can not be made for the first time in the Appellate Court. *Wells v. Ipperson,* 580

Unsupported by the Evidence.—A verdict unsupported by the evidence, and against the great weight and body of it, will be set aside. *O'Bannon v. Vigus,* 84

Special Findings and General Verdict.—Where, in an action for

VERDICTS. *Continued.*

personal injuries occasioned by a fall, which the plaintiff received while a passenger on a railroad train and from which she was endeavoring to alight at a station on the road, the plaintiff relied upon, as the ground of her right of recovering, the failure of the company to stop the train a sufficient length of time to enable her to alight in safety, and the jury, upon a special interrogatory submitted to them, found, that the train did stop a reasonable time at the station, *it was held* that, notwithstanding a general verdict for the plaintiff, a judgment could not be sustained under the declaration. *Chicago & Alton R. R. Co. v. Means,* 894

SPECIAL VERDICTS.

Special verdicts should not be asked upon immaterial and inconclusive actions. *Bayles v. Burgard,* 371

WAIVER. *Change of Venue, 275; Conditions of Contract, 297; Condition of Insurance, 185; Limitation under By-Laws, 185.*

WAIVER OF OBJECTION.

By Taking an Appeal.—On the trial of a suit for the violation of a village ordinance, an objection in the form of a motion to dismiss the suit by the defendant on the ground that the justice was one of the village trustees, and therefore incapacitated to sit in the case, is waived by prosecuting an appeal under the statute. *McGregor v. Village of Lovington,* 202

WARRANTY.

What Constitutes.—A. sold a stallion to R. Pending the bargain R. asked for the pedigree. A. handed him a catalogue, telling him that the pedigree of the horse was on page seven. When he asked about the horse being a sure foal getter, A. answered that there was no doubt about that, that the catalogue contained all that was necessary for him to say about that. As to the quality of the horse as a foal getter the statement in the catalogue was, "He will attract attention anywhere and make his mark as a foal getter." *It was held* that this was by no means a warranty that the horse would attract attention or prove a foal getter, but was only an expression of the belief of the seller as to what might be expected of the horse in the future. *Roberts et al. v. Applegate,* 176

Breach of Rescission.—The rule seems to be well settled that in the absence of fraud, agreement to rescind in case of a breach or insolvency of the seller, or some like special reason, the buyer of property by an unconditional and complete sale can not demand a rescission of the contract simply because the warranty has failed. As a general rule, he must rely on the warranty and recover damages for its breach, or he may recoup such damages in an action against him for the purchase money. *Aultman & Co. v. Withrow,* 492

WASTE.

The American Rule.—The rule is that whatever does lasting damage to the freehold or tends to the permanent loss of the owner of the fee, or destroys or lessens the value of the inheritance, is deemed waste. *Stewart v. Wood,* 378

WASTE. *Continued.*

The American Rule.—The American doctrine as to such rights somewhat enlarges the common law rule and applies in particular cases only; as, if the estate be wholly wild and uncultivated, a part of it may be cleared for cultivation, leaving sufficient timber for the permanent use of the farm. *Stewart v. Wood*, 378

Deeds and Reservations.—A father conveyed land to his daughter with the following reservation in the deed: "Unto said grantors the full and entire profits, use and control of all the above described premises during the natural lives of said grantors." Ten acres of the tract was timber land, upon which a son cut and felled trees under a license, or by authority from his father, the grantor. In action against him for waste, the Circuit Court ruled that the grantor in the deed reserved, by the clause in question, only a life estate, and that the right to cut timber under it, was restricted to three purposes: (1) such as was necessary for improvements on the premises in ordinary repairs; (2) a sufficient amount for ordinary firewood for the grantor, his wife, and the tenants thereon; (3) such timber as was going to decay. On appeal, it was held to correctly state the rule. *Stewart v. Wood*, 378

Defense—Justification.—The fact that the estate in remainder is benefited, or not injured, by the acts of the tenant for life, is always stated as a justification for a departure from the rule at common law. *Stewart v. Wood*, 378

WIFE'S. *Separate property*, 265.

WITNESS. *Calling his Adversary as*, 334.

Competency of Witnesses.—Where a verbal agreement was entered into between two persons and subsequently one of them died and his executor violated the agreement, in an action against him, personally, for damages, the plaintiff was permitted to testify as to what the deceased said as constituting the contract. The defendant objected that the evidence was incompetent, because, though the action was against him personally for a tort, he defended on the ground of his right as executor. It was held unnecessary to decide the question, as two other witnesses had testified to the same matter. *Sprague v. Foster*, 140

Credibility of Witnesses.—The trial court has means and opportunities for judging as to the credibility of witnesses, and as to the weight that ought to be given to their testimony, far superior to that of the Appellate Court, and if the trial court did not discredit their testimony there is no reason why the Appellate Court should do so. *Rindskoph v. Kuder*, 334

WITNESSES—*Reliability of*, 334; *When Testimony not Conclusive*, 334.

WILLS.

Mental Capacity of Deceased Testator.—Where the testimony upon the mental capacity of a deceased testator is voluminous and conflicting and sufficient evidence appears to support the finding of the jury, it will not be disturbed. *Graybeal v. Gardner*, 305

WRIT OF ASSISTANCE, 312; *In Foreclosure Proceedings*, 190.

